



IN THE SUPREME COURT OF THE UNITED
STATES.

Pullman's Palace Car Company,,
Appellant,
vs.
Central Transportation Company,,
Appellee.

October Term, 1897.
Nos. 141 and 496.

BRIFF FOR APPELLEE.

STATEMENT OF THE CASE.

It is believed that the labor of the court in examining the voluminous record in this case will be lightened by a clear, concise and chronological statement of the facts.

This was a bill in equity by Pullman's Palace Car Company against the Central Transportation Company, and a cross bill by the Central Transportation Company against Pullman's Palace Car Company. The two companies, plaintiff and defendant, had been sleeping-car companies, of about the same size, but occupying different territories; the Central Transportation Company operating a system of lines from St. Louis east to the Atlantic and Pullman's Palace Car Company operating a system of lines from Buffalo west to the Pacific. Negotiations entered into for consolidation resulted in a lease of the Central Transportation Company by Pullman's Palace Car Company for ninety-nine years, under a Pennsylvania statute specifically drawn by counsel for that purpose and

passed by the legislature. After the lease had been in operation fifteen years, and after the Central Transportation Company's property had been so absorbed into the Pullman system that identification and separation had become impossible, the two companies quarreled over a clause of the lease. The Central Transportation Company brought suits at law to recover accruing installments of rent, and Pullman's Palace Car Company filed the present bill.

Although long and somewhat involved, this bill alleged in substance, first, that there had been an agreement to diminish the rental; second, that if that agreement had not been consummated, there had been an election by the Pullman Company to annul the lease under a clause giving it that right; and, third, that the lease was *ultra vires* and void. The bill further set out that some of the property existed in specie and some had been destroyed; that an important contract with the Pennsylvania Railroad Company had been renewed in the name of the Pullman Company and could not be reassigned to the Central Transportation Company, and that if the lease had been annulled or was void, there was no obligation on the part of the Pullman Company except to return such property as could be returned and make compensation for such as could not. The bill prayed, first, for an injunction against further suits at law for rent; second, for a decree whether there had not been an agreement for a reduced rental, and if not, for a decree that the lease had been annulled or was void; third, that an account might be stated and such decree made for return of property existing in specie and compensation for property not capable of return as would do equity between the parties. Upon the filing of this bill the court after argument granted an injunction against suits at law for further rental, but refused to interfere with pending suits for rental previously accrued. Pullman's Palace Car Company thereupon set up as a defense to one of these pending suits at law the claim already made in the bill in equity, viz., that the lease itself was invalid. This defense the

court sustained, and its decision was affirmed on appeal. (*Central Transp. Co. vs. Pullman's Palace Car Co.*, 139 U. S., 24.) In the meanwhile the equity suit had proceeded to issue and testimony to the extent of four hundred printed pages had been taken. Immediately, however, upon the decision of the Supreme Court that the lease was invalid, Pullman's Palace Car Company moved to dismiss its bill by which it had tendered restitution of or compensation for the property, and claimed that the effect of the decision was to relieve it from liability to restore or compensate. The Central Transportation Company opposed this motion, and asked leave to file a cross bill praying for discovery, account, return of existing property and compensation for property which could not be returned. The motion to dismiss was refused, and leave was granted to file the cross bill. (Record, page 552.) (*Pullman's Palace Car Co. vs. Central Transp. Co.*, 49 Fed., 261.) The cross bill and an answer thereto were filed and testimony in addition to that already taken under the original bill was put in. Subsequently the cause came on to final hearing before Judges Dallas and Butler. After argument the court in a written opinion (Record, page 745) held that the property of the Central Transportation Company must be returned or paid for; that return had become impossible, and that the measure of compensation was the value of the property when received, together with its earnings since, less the amount paid as rent, and that the value must be ascertained from a careful examination of the property, the business, and its earnings at the time they passed into the hands of the Pullman Company and subsequently. For the purpose of ascertaining these values the court appointed Theodore M. Etting, Esq., Master. (Record, page 1126.) (*Pullman's Palace Car Co. vs. Central Trans. Co.*, 65 Fed., 158.)

The Master subsequently filed his report, in which he found the following facts: The Central Transportation Company was incorporated December 30th, 1862, for twenty years, originally with a capital of \$200,000, which from time to time had been increased until it reached

\$2,000,000 prior to the time of the lease, and which was still further increased at the time of the lease by the issue of \$200,000 of stock for the purchase of patents, making a total capital of \$2,200,000. It had a net earning capacity of nine and one-half per cent. per annum, increased to about eleven and one-half per cent. per annum by the purchase of patents hereinafter mentioned, on which the company had been paying nearly \$50,000 per annum royalty, and it had a business which indicated a healthy growth. Its earnings were made by operating lines of sleeping cars extending from New York, Philadelphia, Baltimore and Washington to Chicago and St. Louis. There were sixteen written contracts with different railroads, covering the operation of most of these lines, but not all of them, as a few lines were operated without any written contract. Pullman's Palace Car Company had been incorporated in 1867 with a capital of \$1,250,000, subsequently increased to \$1,750,000, and with net receipts equal to thirteen per cent. per annum. It operated lines under contracts with lines mostly north and west of Chicago, and extending to the Pacific coast; but it had no means of reaching Philadelphia, Baltimore or Washington from the West, and its only means of reaching New York was by the Grand Trunk and Michigan Central Railroad to Buffalo and the Delaware, Lackawanna and Western Railroad to New York. Its cars were superior in comfort and safety to those of the Central Transportation Company, and this fact affected travel on the lines of the latter company, especially those over the Pennsylvania Railroad and its affiliated companies. In addition to this, the entire condition of sleeping-car transportation at that time was unsatisfactory. Passengers were obliged to change cars at points where the two systems came in contact with each other. The Pennsylvania Railroad and the roads forming its system could not make contracts with Pullman's Palace Car Company because of the existing contracts with the Central Transportation Company. There was pending litigation between the two companies, the Central Transportation Company claiming

that the Pullman Company had infringed its patents. Under these conditions it appeared to be desirable, in the interests of both the sleeping-car companies, the railroads and the public, that a consolidation of the two companies should be effected. Negotiations resulted in: (1) A purchase by the Central Transportation Company of all the patents under which it had been operating at a royalty. To enable this purchase to be made the capital was increased from \$2,000,000 to \$2,220,000. (2) A lease by the Central Transportation Company to the Pullman Company for ninety-nine years, at a rental of twelve per cent. per annum on \$2,220,000, and an assignment by the Central Transportation Company to the Pullman Company of all the former's cars, contracts and patents. (3) A contract between the Pullman Company and the Pennsylvania Railroad Company whereby the various contracts under which the Central Transportation Company had been operating lines over the roads comprising the Pennsylvania system were exchanged for a single fifteen-year contract in the name of the Pullman Company. This contract allowed the equipment to be made up in part of the old Central Transportation Company cars and in part of new cars to be furnished by the Pullman Company, the railroad undertaking to place the old cars in first-class condition.

To obtain legislative authority for the lease by one sleeping-car company to the other, the counsel for the Pennsylvania Railroad Company prepared a statute, which was passed by the Pennsylvania Legislature, intended to authorize the lease, extend the corporate existence of the Central Transportation Company for ninety-nine years and authorize the issue of \$200,000 of new stock.

The effect of these agreements, as stated by the Master, was: "The Pennsylvania Railroad obtained forthwith, for "its entire system, Pullman cars and Pullman connections; "agreeing, however, to accept, as a part of its new equip- "ment, old cars of the Central Transportation Company, "which were to be put in first-class condition. The Central "Transportation Company was thus saved from an expen-

"dition necessary to provide a proper equipment of cars and "better service, which, under other circumstances, would "have been unavoidable, and received at once a sum exceeding "its then earning power by about one-half of one per "cent., and which payment, it was anticipated, it would "continue to receive. An harmonious system of sleeping- "car transportation was thereby established, extending "from the Atlantic to the Pacific, the receipts of which, it "was believed, would be sufficiently large to secure the "continuous payment of the above rental, and also to insure greater prospective value to the Central Transportation Company's shares. The Pullman Company acquired an entrance to the principal cities of the Atlantic "seaboard by favored routes. It at once took the place of "the Central Transportation Company on the Pennsylvania lines, so called, for fifteen years, and also on the lines "of all other railroad companies covered by the assigned "contracts of the Central Transportation Company; and "there was thus established reciprocal relations, which "have, for the most part, since continued. It attained an "ascendancy in the sleeping-car business which has never "since been disputed, as well as a monopoly of a most valuable territory for fifteen years."

The Master further reported that in all of the sixteen contracts between the various railroads and the Central Transportation Company the railroads were to furnish fuel and light, and keep the cars in good order and condition, and in some of them the railroads undertook to renew worn-out parts. Some of the contracts expired at definite dates, others ran for the life of the patents previously taken out. Six of them ran "during the continuance of the "incorporation of" the Central Transportation Company. The Master held that this included the continued corporate existence under the statute subsequently passed, extending the corporate life of the Central Transportation Company beyond the original limit of its charter. After the execution of the lease to the Pullman Company, some of the contracts were replaced by new ones taken in the name of the Pullman Company, and some were canceled. The Master

further reported that at the time of the lease the rolling stock of the Central Transportation Company consisted of about one hundred and nineteen cars and their equipments, of which the total cost was about \$950,000, and the value at the time of the lease about \$712,000, and that the Pullman Company had actually received from various railroads, in settlement of cars retired or destroyed, \$556-933.61, and had on hand thirty-three cars. The Master reported, however, that, on account of the peculiar nature of the contracts, it was, in his judgment, impossible to correctly value the cars, apart from the obligations to maintain and use them set forth in the contracts. The Master further reported that the value of the patents was \$266,000—that being the price paid for them at the time of the lease. He further reported that it was impossible to make a separate appraisal or valuation of the contracts, owing to their peculiar nature and varying terms of duration. The Master then proceeded to report the value of the property taken as a whole. He found that there were three measures of value, which served to check or verify each other, viz.: (1) The testimony of a witness who knew the property well, who was competent to appraise it, and who estimated it to be worth at least \$3,300,000. (2) The market value of the stock of the company at the time of the lease, which was between \$2,464,000 and \$2,640,000. (3) The earning capacity of the property taken in connection with the probable amount to be put aside to restore the capital on a fair expectancy of probable life, and this value the Master estimated as at least fifty dollars per share. The Master then reported as follows: "The several forms of valuation above considered may be summed up as follows: If Torrey's valuation is to be adopted, the capital stock of the company was worth about seventy-five dollars a share. If the public estimate is to be adopted, the stock was worth from fifty-six dollars to sixty dollars a share. If the estimate predicated on earnings, coupled with probable life, is to be adopted, the stock was worth at least fifty dollars a share. The two latter estimates serve to verify each other, and to indicate that Torrey's

"testimony is excessive. They are both so far below the capitalized value of the rental agreed to be paid by the Pullman Company that either of them, if accepted, would leave a large margin for the illegal consideration which the court has directed shall be excluded from the account. Which of the two is to be preferred? And, if the price of the stock on the street is to be accepted as the measure of value of the property when transferred, what figure is to be adopted? The estimate of probable life is hypothetical. The value of the stock on the street is a positive indication of the estimate placed on the property by the public. That it is not entirely a satisfactory measure of value must be conceded, but in the judgment of the Master, supported as it is by the best independent estimate that the evidence affords, it should be accepted as the fairest criterion of value. This amount has, according to the testimony, been placed at from fifty-six dollars to sixty dollars a share; and, whilst the evidence as to these values is not as satisfactory as the Master "would wish, it is nevertheless uncontradicted. As between the two quotations above named, which indicate the fluctuations of the stock in value, the Master "has taken the average, or, in other words, a valuation "of fifty-eight dollars a share. This, he believes, is as "fair and equitable a valuation as is possible, under the "testimony; and he accordingly reports the value of the "property, when received, is by him appraised at fifty- "eight dollars a share, or \$2,552,000." With regard to the earnings of the property after it had been delivered under the lease, the Master reported: "An accurate ascertainment of the earnings, without further "evidence than that which has been produced before the "Master, is impossible. The plant, upon the execution of "the lease, became absorbed in a system in which the elements of new contracts, additional cars and added lines "entered so largely that, from the evidence presented, it "is not possible to distinguish accurately the earnings applicable to the property assigned. General results, therefore, can only be ascertained." The Master then pro-

ceeded to discuss the contentions of the respective parties as to the earnings, under certain statements which had been produced, and held that neither estimate was satisfactory or complete. He then reported as follows: "The Pullman Company has failed, though requested by the Master, to furnish him with such information, which would, he believed, have enabled him to state an account. In so doing it has doubtless conformed to what its counsel have advised as the true interpretation of the order of reference, but the testimony furnished has not been sufficient to make it possible for the Master to comply with the directions of the court, as they are understood by him; and he accordingly is compelled to report that he has not as yet been furnished with sufficient data to enable him to ascertain the difference between the rental paid to the Central Transportation Company from January 1st, 1870, to January 1st, 1885, and the receipts derived by the Pullman Company from its use of the property transferred during the period above referred to."

Both parties filed exceptions to this report. The Pullman Company prefaced its exceptions by a protest that the Central Transportation Company was not entitled to any recovery, and that the Pullman Company was protected by the Statute of Limitations. The exceptions, which were voluminous, covered substantially three objections, viz.: (1) That the Pullman Company was not accountable for the intangible property, such as contracts, &c.; (2) that the valuation was too high; (3) that the rents paid more than compensated for all the property received. There were numerous other exceptions to matters of detail, but the above comprehended the substantial objections. The exceptions of the Central Transportation Company were to the refusal of the Master to find that the property was worth at least \$3,000,000, and his failure to report that the failure of the Pullman Company to furnish the information necessary to state an account of earnings entitled the Central Transportation Company to a decree for the value of the property, without reference to the earnings. On the argument the Central Transporta-

tion Company, for the purpose of avoiding delay, offered to waive any claim for excess of earnings over the rental paid, and asked for a decree for the value of the property, with interest from the time when the Pullman Company repudiated the lease.

The exceptions were argued before the same judges who had sat at final hearing. After argument the exceptions were dismissed, the court holding that compensation must be made for the entire business received and absorbed, including both contracts and cars; that the valuation made by the Master was not unjust to the Pullman Company; that the inference from the testimony was that the earnings during the lease were equal to the rent paid; that the testimony produced on this point was sufficient to put the burden of proof on the Pullman Company; that while the value for which the latter company was responsible was the value at the repudiation of the lease, that value, owing to the absorption of the property, would be difficult of ascertainment except by reference to the value at the date of the lease; and that as the evidence justified the presumption that the property increased in value during the lease, the amount of compensation to be paid should be the valuation of the Master, with interest from the date of the repudiation of the lease. The court therefore entered a decree in favor of the Central Transportation Company for \$2,552,000, with interest from the date of the repudiation of the lease. (Record, page 1194.) (Pullman's Pal. Car Co. vs. Cent. Trans. Co., 72 Fed. Rep., 211.)

Thereupon Pullman's Palace Car Company took an appeal to the Supreme Court of the United States, despite the protest of the Central Transportation Company that no Federal question was involved. (Record, page 1199.) Three months afterwards, while this appeal was pending and undetermined, Pullman's Palace Car Company took another appeal to the Circuit Court of Appeals for the Third District. This second appeal came on to be heard first, and after argument the court sustained its jurisdiction, but suspended delivery of an opinion on the merits

until the prior appeal to the Supreme Court of the United States should be determined. (Record, page 1217.) Subsequently Pullman's Palace Car Company applied to the Supreme Court for a writ of *certiorari* to bring up the case pending in the Circuit Court of Appeals, and this was granted. Both appeals are therefore now before the Supreme Court of the United States for final hearing.

ARGUMENT.

The case raises three questions:—

- 1. Was there any Federal question involved which would sustain the appeal to the Supreme Court of the United States?**
- 2. Was the second appeal, which, was taken to the United States Circuit Court of Appeals subsequent to and pending an appeal to the Supreme Court of the United States, valid?**
- 3. If either appeal was valid, was the decree appealed from erroneous?**

These will be considered separately.

Was there any Federal question involved which would sustain the appeal to the Supreme Court of the United States?

Of the twenty-nine assignments of error filed by appellant upon the appeal to the Supreme Court of the United States, but three purport to relate to any question which would give that court jurisdiction. These three are:—

7. The court erred in holding that the subject matter of the said cross bill, being matter of a purely legal nature, and of the enforcement of a purely legal right, was not excluded from the cognizance of equity by the force of the seventh amendment to the Constitution of the United States.

8. The court erred in not holding that the subject matter of said cross bill was the proper subject matter of action at law only, and of trial at law and by jury, both under the provisions of the seventh amendment of the Constitution of the United States and of section 723 of the Revised Statutes of the United States.

23. The court erred in holding that the finding of the Master was correct; that certain railway contracts belonging to the Central Transportation Company, and which were originally made to continue "during the continuance of incorporation" of the Central Transportation Company, were continued in force and extended for the period of ninety-nine years by force of the Act of the Legislature of the State of Pennsylvania of the 9th of February, A. D. 1870, by which the said Transportation Company was given a corporate life for the period of ninety-nine years from the time of the expiration of its then existing charter; and the court erred in not holding that such effect of the said legislative Act of the 9th of February, 1870, was in conflict with and would be forbidden by Article I., section 10, of the Constitution of the United States, which prohibits on the part of the States any enactment impairing the obligation of contracts.

It will be seen that these assignments raise but two questions, viz.:—

I. WHETHER THE DECISION OF THE CIRCUIT COURT THAT, UNDER THE GENERAL PRINCIPLES OF EQUITY JURISPRUDENCE, THE CASE WAS ONE IN WHICH THE RESPONDENT WAS ENTITLED TO AFFIRMATIVE RELIEF BY CROSS BILL, WAS THE DEPRIVATION OF A CONSTITUTIONAL RIGHT OF COMPLAINANT TO A JURY TRIAL, WHICH GAVE COMPLAINANT A RIGHT TO APPEAL DIRECTLY TO THE SUPREME COURT OF THE UNITED STATES INSTEAD OF TO THE CIRCUIT COURT OF APPEALS.

2. WHETHER IN A CASE IN WHICH THE CHARTER OF A CORPORATION HAD BEEN EXTENDED BY STATUTE, AND THE COURT SUBSEQUENTLY, IN VALUING A CONTRACT WITH THAT CORPORATION CONTAINING A PROVISION THAT THE CONTRACT SHOULD CONTINUE DURING INCORPORATION, INTERPRETED THE CONTRACT AS MEANING THAT IT WAS TO CONTINUE DURING BOTH THE ORIGINAL TERM AND ANY EXTENSION, THIS INVOLVED ANY DECISION AS TO WHETHER THE STATUTE IMPAIRED THE OBLIGATION OF A CONTRACT.

These questions will be considered separately, but before discussing them it may be well to cite the portions of the Act of March 3d, 1891, and of the Constitution of the United States, upon which the appellant has based its claim to an appeal to this court:—

ACT MARCH 3D, 1891.

SEC. 5. That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases:—

In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.

From the final sentences and decrees in prize causes.

In case of conviction of a capital or otherwise infamous crime.

In any case that involves the construction or application of the Constitution of the United States.

In any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question.

In any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States.

Nothing in this Act shall affect the jurisdiction of the Supreme Court in cases appealed from the highest court of a State nor the construction of the statute providing for review of such cases.

CONSTITUTION OF THE UNITED STATES, SEVENTH AMENDMENT.

In suits at common law where the value in controversy shall exceed twenty dollars the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

CONSTITUTION OF THE UNITED STATES, ARTICLE I., SECTION 10.

1. No State shall enter into any treaty, alliance or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law or laws impairing the obligation of contracts, or grant any title of nobility.

As to the first question:—

WHETHER THE DECISION OF THE CIRCUIT COURT THAT, UNDER THE GENERAL PRINCIPLES OF EQUITY JURISPRUDENCE, THE CASE WAS ONE IN WHICH THE RESPONDENT WAS ENTITLED TO AFFIRMATIVE RELIEF BY CROSS BILL, WAS THE DEPRIVATION OF A CONSTITUTIONAL RIGHT OF COMPLAINANT TO A JURY TRIAL, WHICH GAVE COMPLAINANT A RIGHT TO APPEAL DIRECTLY TO THE SUPREME COURT OF THE UNITED STATES INSTEAD OF TO THE CIRCUIT COURT OF APPEALS.

In the court below the question arose in this way: Pullman's Palace Car Company had originally filed a bill in equity asserting, *inter alia*, that its lease from the Central Transportation Company had been annulled under an option to annul reserved in it, and in any event was *ultra vires* and void; that the property could not all be returned in specie; that some contracts had been merged in a contract in the name of the lessee; that some cars had been destroyed, and that the interposition of a court of equity was necessary to make equitable restitution or compensation and account.

The following extracts from the bill (Record, pages 20, 21) illustrate the allegations and relief asked:—

And your orator shows that in said lease it is recited that the said contract of lease is made on the part of the defendant, the said Central Transportation Company, under an Act of the General Assembly of the Commonwealth of Pennsylvania therein named, approved the ninth day of February, A. D. 1870, a copy whereof is hereto attached, marked "Exhibit G," and referred to as a part of this bill; but your orator is advised, and therefore submits it to the court, that the said lease, being a grant, assignment and transfer of all the property, contracts and rights of the said defendant, the Central Transportation Company, and including a covenant on the part of said defendant corporation not to transact, during the existence of said lease, any of the business for the transaction of which it was incorporated, was never legally valid between the parties thereto, but was void for the want of authority and corporate power on the part of defendant to make the said contract of lease, and because the same was in violation of the charter conferring the corporate powers of said defendant, and of the purpose of its incorporation, as by the said charter, to which, for greater certainty, refer-

ence is made, your orator is advised it will appear; that the said contract of lease was never susceptible of being enforced in law by your orator against said defendant, and cannot, therefore, be construed and held to continue in force and obligatory upon your orator; and that your orator can be under no other legal obligation or equitable duty to the defendant than to return such of the property assumed to be demised as is capable of being returned, and to make just compensation for such other of the said property as, under the said contract of lease, it ought to make compensation for, which it is willing and now offers to do. * * *

And in case it shall be considered that the acts of the parties and the agreements hereinbefore stated do not constitute in legal effect an election by your orator conclusive on both parties to pay to the said defendant a share of the net revenue arising from the operation of said lease, that your orator may be held to have been entitled to exercise its option to annul said lease under the provisions of said eighth section, and that its action in that regard to that end hereinbefore stated may be held to have been valid and effectual; and that this court will lend its aid to your orator in making the surrender of demised property to the defendant and relieve your orator from the embarrassments set forth in this bill; and that the court will declare by its decree the rights of the defendants, if any, in the said contract with the Pennsylvania Railroad Company and make such disposition thereof as may be equitable, and that it may be held that your orator is not bound or holden to more than just compensation to the defendant for such of the demised property as cannot be actually restored or in literal compliance with the terms of the lease, and that your orator may be held under no obligation to continue to perform the terms of said lease and to pay the rental of \$264,000 per annum therein originally reserved; and that the court may consider and decree whether said contract of lease was not made without authority of law on the part of the defendant, and in excess of its corporate powers, and in violation of its corporate duties, so as not to be enforceable against your orator beyond the obligation of your orator to make return of or just compensation for the property demised; and that an account may be taken between your orator and the defendant, and that the amount may be ascertained that should be paid by your orator to the defendant on any account whatever.

Under this bill Pullman's Palace Car Company obtained an injunction against further suits at law under the lease, and a large amount of testimony was taken which would be useful to both sides on the question of account. After the Supreme Court of the United States had affirmed a decision that the lease was void for the reasons given in

the bill, Pullman's Palace Car Company sought to withdraw its bill, and the Central Transportation Company asked leave to file a cross bill. The question was argued, first on the respective motions to withdraw the original and to file the cross bill, and afterwards on demurrers filed to the cross bill for want of equity. (Record, pages 551 to 553, folios 1011 to 1017, and pages 558 to 562, folios 1025 to 1036.)

The Central Transportation Company was allowed to file its cross bill and the demurrers to this bill were overruled. (Record, page 552, folio 1015, and page 562, folio 1035.) The case then proceeded to final hearing, and resulted in a decree in favor of the Central Transportation Company. Pullman's Palace Car Company now seeks to maintain an appeal to this court upon the ground that the effect of allowing the cross bill was to deprive the original complainant of a right of trial by jury, and that therefore a constitutional question was necessarily involved.

The fallacy of the appellant's contention lies in the assumption that whenever the result of a decision is to deprive a party of an opportunity to try a question before a jury, a constitutional question is necessarily involved. There are many decisions which do not involve constitutional questions but which indirectly take away the right of trial by jury. Whenever at common law the court sustains a demurrer to the declaration or complaint or directs a verdict, and whenever in equity the court overrules a demurrer based on want of equity or on the existence of an adequate remedy at law, the result is the taking away of the opportunity to try before a jury; but such decisions are in no proper sense decisions of constitutional questions. The seventh amendment to the Constitution of the United States merely "preserves" the "right of trial "by jury" "in suits at common law," and if under the application of the principles of common law or of equity as they existed at the time of the adoption of the Constitution the right to a jury trial does not exist, the constitutional provision has no application. It may be said that

if the court errs in interpreting or applying these principles of common law or equity the result is a deprivation of the constitutional right, but this is an indirect result, not arising from an erroneous decision of the constitutional question, but an erroneous decision on the other questions of general jurisprudence, and the remedy for such erroneous decision on the general principles of law is by appeal to the Circuit Court of Appeals, to whom is given the decision of questions not constitutional. To hold otherwise would be to give a right to appeal directly to the Supreme Court of the United States wherever the effect of the decision below was to eliminate a jury trial, a result never contemplated by the Act of March 3d, 1891.

The decisions of this court have been in entire accord with the principles above suggested. In the case of—

In re Lennon, 150 U. S., 393 (1893), a railroad company filed a bill in the United States Circuit Court, and obtained an injunction to restrain another railroad company from refusing to receive its cars. Subsequently the defendant company applied for an attachment against some of its employees who had refused to haul the cars of the plaintiff company. One of the employees after hearing was fined and committed. He applied to the same court for a writ of *habeas corpus*, on the ground that as he was not a party to the original cause the court had no jurisdiction over him. The court denied the application and dismissed the petition. The employee thereupon appealed to the Supreme Court of the United States, and attempted to sustain his appeal on the theory that he had been deprived of his liberty without due process of law. The Supreme Court dismissed his appeal, saying (the Chief Justice delivering the opinion):—

Nor can the attempt be successfully made to bring the case within the class of cases in which the construction or application of the Constitution is involved in the sense of the statute on the contention that the petitioner was deprived of his liberty without due process of law. The petitioner does not proceed on any such theory, but entirely on the ground of want of jurisdiction in the prior case over the subject matter and over the person of petitioner in respect of inquiry into which the jurisdiction of the Circuit Court was sought. If, in the

opinion of that court, the restraining order had been absolutely void or the petitioner were not bound by it, he would have been discharged, not because he would otherwise be deprived of due process, but because of the invalidity of the proceedings for want of jurisdiction. The opinion of the Circuit Court was that jurisdiction in the prior suit and proceedings existed, and the discharge was refused, but an appeal from that judgment directly to this court would not, therefore, be on the ground that the application of the Constitution was involved as a consequence of an alleged erroneous determination of the questions actually put in issue by the petitioner.

In the case of—

Treat Mfg. Co. vs. Standard Steel & Iron Co., 157 U. S., 674 (1895).

the action was at common law, and the court below directed a verdict for defendant. An appeal was taken directly to the Supreme Court of the United States, but this appeal was, on motion, dismissed, the court (the Chief Justice delivering the opinion) saying:—

This was an action of trespass on the case. At the conclusion of the trial the defendants moved the court to charge the jury to find the issues for defendants, which motion was granted, and the jury was directed upon the whole case to return a verdict for defendants, plaintiff duly excepting. Thereupon the jury returned a verdict accordingly; plaintiff moved for a new trial, which was denied, and judgment was given against plaintiff on the verdict. This judgment was rendered December 3d, 1890. The writ of error from this court was brought November 24th, 1891. The only ground relied on to sustain the jurisdiction of this court is that the case "involves the construction "or application of the Constitution of the United States," because plaintiff in error was deprived of the right of trial by jury. But it is well settled that where the trial judge is satisfied upon the evidence that the plaintiff is not entitled to recover, and that a verdict, if rendered for plaintiff, must be set aside, the court may instruct the jury to find for the defendant. *Grand Chute vs. Winegar*, 15 Wall, 355; *Marion County vs. Clark*, 94 U. S., 278; *Herbert vs. Butler*, 97 U. S., 319. *If the court errs as matter of law in so doing the remedy lies in a review in the appropriate court.*

In the case of—

Iowa Central Ry. Co. vs. State of Iowa, 160 U. S., 389 (1896),

the Attorney-General of the State of Iowa filed a petition in the Supreme Court of Iowa praying for a mandatory order on the Iowa Central Railway Company to operate a certain portion of its road in compliance with a decree made against another corporation. The Iowa Central Railway Company filed an answer denying that it was a party to the suit in which the decree had been made, and that it was liable to perform the decree. The railway company also filed a demand for a jury trial. The court granted the mandatory order, whereupon the railway company took a writ of error to the Supreme Court of the United States on the ground that the summary proceedings against it were in violation of rights guaranteed by the Constitution of the United States. The Supreme Court of the United States dismissed the writ of error for want of jurisdiction, saying (Mr. Justice White delivering the opinion):—

It is manifest that it was never contemplated by the framers of the Constitution that this court should sit in review, as an appellate court, of such a question as that presented by the record in the case at bar, viz., whether or not the highest court of a State erred in holding that it could rightfully determine, from the statements in the pleadings filed by both parties to a controversy pending before it, that the averments of an answer set forth no defense to the claim of the plaintiff.

It was not a denial of a right protected by the Constitution of the United States to refuse a jury trial, even though it were clearly erroneous to construe the laws of the State as justifying the refusal. *Brooks vs. Missouri*, 124 U. S., 394; 8 Sup. Ct., 443; *Ex parte Spies*, 123 U. S., 131, 166.

In the case of—

Smith vs. McKay, 161 U. S., 355 (1896), a bill in equity was filed in the Circuit Court of the United States for the District of Massachusetts. Respondents filed an answer averring that complainant, so far as he had any just cause of action, had a plain, adequate and complete remedy at law, and moved on this ground to dismiss the bill. This motion was denied, and the cause proceeded to a final decree in favor of complainant. Respondent thereupon took an appeal directly to the Su-

preme Court of the United States. The latter court dismissed the appeal, saying (Mr. Justice Shiras delivering the opinion):—

It is further contended by the appellee that this appeal should be dismissed because there is no right of appeal to this court in such a case as the present one.

The appellants claim that this appeal is within the first class under section 5 of the Judiciary Act of March 3d, 1891, providing that "in "any case in which the question of the jurisdiction of the court is in "issue, in such case the question of jurisdiction alone shall be certified "to the Supreme Court from the court below for decision."

The position of the appellee is that only questions of Federal jurisdiction can be brought directly here; that, if the Circuit Court has jurisdiction of the parties and of the matters in dispute, the fact that it is contended that it has no jurisdiction on its equity side raises no question of jurisdiction, within the meaning of the Act under which this appeal is taken; and that whether a case has been made out by the plaintiff in equity or at law is not a question that puts in issue the jurisdiction of the court, in the sense in which that phrase is used in the Judiciary Act. The question thus raised has never been directly decided by this court. It did present itself in the case of World's Columbian Exposition Case, 18 U. S. App., 42; 6 C. C. A., 58; 56 Fed., 654. That was a case in which the Circuit Court of the United States for the Northern District of Illinois had granted, at the suit of the United States, an injunction against the World's Columbian Exposition, a corporation of the State of Illinois, restraining the defendant from opening the exposition grounds or buildings to the public on Sunday. From this decree an appeal was taken to the Circuit Court of Appeals for the Seventh Circuit, and that court, speaking through Chief Justice Fuller presiding, stated and disposed of the question as follows:—

"The appellees have submitted a motion to dismiss the appeal upon "the grounds that the jurisdiction of the Circuit Court was in issue; "that the case involved the construction or application of the Constitution of the United States; that the constitutionality of laws of the "United States was drawn in question therein; that therefore the appeal from a final decree would lie to the Supreme Court of the United "States, and not to this court; and hence that this appeal, which is "from an interlocutory order, cannot be maintained under the seventh "section of the Judiciary Act of March 3d, 1891.

"We do not understand that the power of the Circuit Court to hear "and determine the cause was denied, but that the appellants contended that the United States had not, by their bill, made a case properly cognizable in a court of equity. The objection was the want of "equity, and not the want of power. The jurisdiction of the Circuit

"Court was therefore not in issue, within the intent and meaning of the Act."

We regard this as a sound exposition of the law, and, applied to the case now in hand, it demands a dismissal of the appeal on the ground that the objection was not to the want of power in the Circuit Court to entertain the suit, but to the want of equity in the complainant's bill. The appellants' contention in this respect would require us to entertain an appeal from the Circuit Court in every case in equity in which the defendant should choose to file a demurrer to the bill on the ground that there was a remedy at law.

When the requisite citizenship of the parties appears, and the subject matter is such that the Circuit Court is competent to deal with it, the jurisdiction of that court attaches; and whether the court should sustain the complainant's prayer for equitable relief, or should dismiss the bill with leave to bring an action at law, either would be a valid exercise of jurisdiction. If any error were committed in the exercise of such jurisdiction, it could only be remedied by an appeal to the Circuit Court of Appeals.

The learned counsel for the appellants claims in his brief that the case of *Mississippi Mills vs. Cohn*, 150 U. S., 202, sustains his present contention.

That was an appeal from the Circuit Court of the United States for the Western District of Louisiana, under the provisions of the Act of February 25th, 1889 (25 Stat., 693, ch. 36). The court below dismissed the complainant's bill in equity on the ground that no relief could be had in equity because, under the practice prescribed by a State law, there was a remedy by an action at law. But this court held that the jurisdiction of Federal courts, sitting as courts of equity, cannot be enlarged or diminished by State legislation, and that hence the Circuit Court had committed error by allowing a State law to overturn the well-settled practice in the Federal court. In the condition of the Federal statutes at that time there was no Circuit Court of Appeals, and the plaintiff's remedy, given him by the Act of February 25th, 1889, was by appeal to this court. Should such a state of facts again arise, the remedy would now be by appeal to the Circuit Court of Appeals.

Applying the principles laid down in these cases to the present case, the conclusion is inevitable that the appeal should be dismissed. The decree below sustaining the cross bill was not based on the decision of any constitutional question, but on the decision of the question whether under the well-settled principles of equity jurisprudence the respondent was entitled to equitable relief under the cross bill. If the court below erred in the de-

cision of that question, the remedy under the Act of March 3d, 1891, was by appeal to the Circuit Court of Appeals, and not to the Supreme Court of the United States.

As to the second question:—

WHETHER IN A CASE IN WHICH THE CHARTER OF A CORPORATION HAD BEEN EXTENDED BY STATUTE, AND THE COURT SUBSEQUENTLY, IN VALUING A CONTRACT MADE BY THAT CORPORATION CONTAINING A PROVISION THAT THE CONTRACT SHOULD CONTINUE DURING INCORPORATION, INTERPRETED THE CONTRACT AS MEANING THAT IT WAS TO CONTINUE DURING BOTH THE ORIGINAL TERM AND ANY EXTENSION, THIS INVOLVED ANY DECISION AS TO WHETHER THE STATUTE IMPAIRED THE OBLIGATION OF A CONTRACT.

This question does not require much argument. The charter of the Central Transportation Company was originally for twenty years, and would have expired in 1882. In 1870 the Pennsylvania Legislature by a statute (printed in the Record, page 532, folio 973) extended the charter for ninety-nine years. The statute did not in any way refer to existing contracts or attempt to extend them. No question as to the validity or constitutionality of this statute has ever been raised or decided. In the course of the present suit it became necessary to ascertain the value of the original Central Transportation Company's plant, which at the time of the Pullman lease included various railroad contracts. Some of these contracts were limited to continue "during the continuance of the incorporation" of the Central Transportation Company (Record, page 1144, folio 1944), and in considering their value as a part of the plant the question incidentally arose whether the legal construction of their language was that they were to continue during the corporate life of the Central Transportation Company, or only until the expiration of the period originally named in its charter. The question never was raised by the parties to the contracts, and was only

raised in this suit upon the question of the value of the plant. The Master decided that the contracts were to be construed as continuing during the corporate life of the Central Transportation Company, and his report was confirmed by the court. Pullman's Palace Car Company, in order to obtain an appeal to this court, now contend that the effect of the statute in connection with the decision of the Master as to the meaning of the contract was to extend the terms of the original contract, and that therefore the statute impaired the obligation of the contract and was unconstitutional. The statement of this proposition is its best refutation. No question as to the validity of the statute was raised. It did not purport to affect the contracts in any way. The question raised was as to the meaning of the parties to the contracts as interpreted by the language used. This was not a constitutional question and could not justify an appeal to the Supreme Court of the United States.

It is submitted that the record does not present any Federal question which justified an appeal to the Supreme Court of the United States and that the appellee's motion to dismiss this appeal already filed in the cause should be granted.

Was the second appeal, which was taken to the United States Circuit Court of Appeals subsequent to and pending an appeal to the Supreme Court of the United States, valid?

The general principle which seems to be thoroughly well established, without dissent, is that two proceedings cannot be taken at the same time by the same party to review a judgment. The law is thus stated in

Elliott on Appellate Procedure, section 528, page 450:—

Upon the general principle illustrated in the many cases which hold that a party cannot prosecute a suit to review a judgment and an

appeal to reverse it at the same time, it must be held that a party cannot prosecute two appeals in the same case and against the same judgment. The prosecution of the second appeal will not be permitted, but an order dismissing it will be granted on motion.

The same principle is laid down in the following cases:—

- Young *vs.* Groner, 22 Wis., 205;
- Schweickhart *vs.* Stuewe, 75 Wis., 157;
- Buscher *vs.* Knapp, 107 Ind., 340;
- Harvey *vs.* Fink, 111 Ind., 249;
- Masonic Temple *vs.* Commonwealth, 12 S. W., 143
(Kentucky Appeals);
- Kirk *vs.* Reynolds, 12 Cal., 99;
- Brill *vs.* Meek, 20 Mo., 358;

As was well said by the court in

Rosenberger *vs.* Jones, 48 Missouri Appeals, 608, in which a second appeal was taken to the Court of Appeals after an appeal had been taken directly to the Supreme Court:—

If this court should reverse the judgment of the Circuit Court on this motion, its order, if it could have any legal effect, would oust the jurisdiction of the Supreme Court of an appeal pending before it. The very statement of this proposition shows that we have no jurisdiction.

After the passage of the Act of March 3d, 1891 (26 Statute, 826), an attempt was made to have that Act construed so as to allow two appeals by the same party; one to the Supreme Court on the question of jurisdiction, and the other to the Circuit Court of Appeals on the other questions; but the Supreme Court repudiated any such construction, and in the case of

McLish *vs.* Roff, 141 U. S., 661-665,
said:—

From the very foundation of our judicial system the object and policy of the Acts of Congress in relation to appeals and writs of error (with the single exception of a provision in the Act of 1875 in relation to cases of removal, which was repealed by the Act of 1887) have been to save the expense and delays of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it de-

cided in a single appeal. *Forgay vs. Conrad*, 6 Howard, 201-204. The construction contended for would render the Act under consideration inconsistent with this long-established object and policy. More than this, it would defeat the very object for which that Act was passed. * * * It is further argued, in support of the contention of the plaintiff in error, that if it should be held that a writ of error would not lie upon the question of jurisdiction until after a final judgment, such ruling would lead to confusion and absurd consequences, and the question of jurisdiction would be certified to this court, while the case on its merits would be certified to the Circuit Court of Appeals; that the case would be before two separate appellate courts at one and the same time; and that the Supreme Court might dismiss the suit upon the question of jurisdiction while the Circuit Court of Appeals might properly affirm the judgment of the lower court upon the merits. The fallacy which underlies this argument is the assumption that the Act of 1891 contemplates several separate appeals in the same case and at the same time to two appellate courts. No such provision can be found in the Act, either in express terms or by implication. The true purpose of the Act, as gathered from its context, is that the writ of error or the appeal may be taken only after final judgment, except in the cases specified in section 7 of the Act. When that judgment is rendered, the party against whom it is rendered must elect whether he will take his writ of error or appeal to the Supreme Court upon the question of jurisdiction alone or to the Circuit Court of Appeals upon the whole case; if the latter, then the Circuit Court of Appeals may, if it deem proper, certify the question of jurisdiction to this court.

In the subsequent case of
Maynard vs. Hecht, 151 U. S., 324-326,
the Supreme Court again said:—

The Act of 1891 was framed in this regard in view of the former Act, and section 5 restricts the power of this court in all suits in which its appellate jurisdiction is invoked by reason of the existence of a question involving the jurisdiction of the Circuit Court over the case, to the review of that question only. The Act did not contemplate several appeals in the same suit at the same time, but gave to a party to a suit in the Circuit Court, where the question of the jurisdiction of the court over the parties or subject matter was raised and put in issue upon the record at the proper time and in the proper way, the right to a review by this court, after final judgment or decree against him, of the decision upon that question only, or by the Circuit Court of Appeals on the whole case.

It is true that in the case of
United States vs. Jahn, 155 U. S., 109.
the court held that where there was a decision by the Cir-

cuit Court sustaining the jurisdiction, and both parties wished to take appeals, the defendant on the question of jurisdiction alone, and the plaintiff on the question of the amount of the judgment in his favor, there could be two appeals by the different parties to the different courts, inasmuch as the question raised by each appeal could not be considered on the other appeal; and in that case it was held that the Circuit Court might suspend consideration of the plaintiff's appeal until the question of jurisdiction had been decided by the Supreme Court; but in that case the court was careful to say (page 113):—

The Act certainly did not contemplate two appeals or writs of error at the same time, by the same party, to two different courts.

The exact question involved in the present case was raised under precisely similar circumstances in the Supreme Court of Louisiana in

Freiberg vs. Langfelder, 45 La. Ann., page 983 (13 Southern Reporter, 404).

In that State there is a Circuit Court of Appeals and also a Supreme Court. In order to relieve what it considered a case of hardship, the Supreme Court had held that in case of uncertainty as to which court had jurisdiction contemporaneous appeals might be taken to both courts, and where the appeal to one court had been dismissed before the appeal to the other had been reached it would sustain the other appeal. As usual, however, where a court departs from sound principles to relieve the hardship of a particular case the court found itself involved in the next case in some difficulty. A case had been decided by the lower court and two appeals had been taken, one to the Circuit Court of Appeals and one to the Supreme Court. They were made returnable at different times, and the one to the Circuit Court was duly lodged in that court and made returnable before the other appeal was lodged and made returnable in the Supreme Court. The appeal to the Supreme Court was thus brought to it while the appeal to the Circuit Court was pending and undetermined. The court dismissed the second appeal, and upon a rehearing refused to depart from its ruling.

The whole text of the opinion is as follows:—

FENNER, J.—The several plaintiffs in these cases having encountered adverse judgments in the court below, and being, as we suppose, in doubt as to whether the cases were within the appellate jurisdiction of the Circuit Court of Appeals or of this court, applied for and obtained at the same time two orders of appeal, one to the Circuit Court, returnable on the first Monday of June, 1893, and the other to this court on the second Monday of June, 1893. A motion to dismiss, filed by appellee, brings to our notice the fact (admitted by appellants) that the first appeal was duly lodged in the Circuit Court, and was pending in said court undetermined at the time when the appeal was filed in this court, and still remains undetermined. In consideration of the double appellate jurisdiction granted to the Supreme and Circuit Courts over District Courts, and of the uncertainty which sometimes attends the determination as to which is the proper appellate tribunal, we are disposed to recognize the practice which seems to prevail in ambiguous cases of taking at the same time orders of appeal to both appellate courts. In the case of *Bennett vs. Creditors*, 13 South Rep., 402 (decided at this term), where appeals had been taken both to the Circuit and to the Supreme Court, and where the appeal to the Circuit Court had been dismissed for want of jurisdiction before the appeal to this court had been filed here, we declined to dismiss the latter appeal, saying: "The first appeal prosecuted was a nullity, and the "second valid and legal. It was in force and could be prosecuted in "accordance with the order granting it. Because the other order, "obtained at the same time, was null and void, it could not affect the "order of appeal made returnable to this court." If this case stood in like position, we should pursue the same course. But the case before us is essentially different. We are confronted with the fact that the appeal taken to the Circuit Court was duly prosecuted, and had been lodged in that court before the appeal was returned in this court, and is still pending there undetermined. Is it possible that there can be two appeals, by the same party, from the same judgment, pending at the same time, in two different courts? We can discover no warrant of law for such a proposition. It may be that the appeal to the Circuit Court may be nugatory, as not within its jurisdiction, and that the Circuit Court may so decide and dismiss that appeal, as it did in the *Bennett* case. But the Circuit Court is vested with unquestioned and exclusive authority to determine primarily the question of its jurisdiction over the appeal. When it has decided, resort may be had to our supervisory jurisdiction to compel or forbid it to entertain jurisdiction, but we have universally declined to exercise our supervisory powers until the question of jurisdiction has been first submitted to and decided by the Circuit Court. For us to entertain jurisdiction of the appeal to this court would be, in effect, to order a dismissal of the appeal to the Circuit Court in advance of any deter-

mination by that court of its own jurisdiction. The two appellate jurisdictions are exclusive of each other. If this court has jurisdiction, the Circuit Court cannot have it—at least over the whole judgment; and both appeals are taken from the whole judgment without discrimination. Appellants have themselves invoked the appellate jurisdiction of the Circuit Court, and they must submit to that jurisdiction until it has been determined in proper proceedings and by proper authority that the Circuit Court has no jurisdiction. Then, and not till then, can they appeal to this court. We cannot, in this case, decide that the Circuit Court has no jurisdiction of an appeal regularly taken and pending before it, and it is impossible for us to entertain this appeal without so deciding. It is, no doubt, unfortunate for appellants that their two appeals thus find themselves in conflict; but it was a risk that they assumed when they took the two appeals that if the first appeal was not disposed of before the return day of the second, the latter would necessarily lapse. It is a legal impossibility that they should bring their second appeal to this court while the first appeal is still pending undetermined in the Circuit Court. It does not lie in the mouths of appellants to question the jurisdiction of the Circuit Court, which they have themselves invoked. Their adversaries may question it, and if they do so successfully appellants may then invoke the jurisdiction of this court; but so long as the appellees are held under the appeal in the Circuit Court, they cannot be impleaded in this court under an appeal by the same parties from the same judgment.

We have reflected on appellants' dilemma from every point of view without being able to discover any alternative except to dismiss the appeal. In doing so we shall reserve their right to take a new appeal to this court in case the Circuit Court shall be held to be without jurisdiction. It is therefore ordered that the appeal be dismissed without prejudice to appellants' right to take a new appeal to this court in case the pending appeal to the Circuit Court of Appeals shall be dismissed for want of jurisdiction.

ON REHEARING.

Counsel for appellants insist that in dismissing plaintiffs' appeal our opinion runs counter to the Constitution and laws, relying on *Henry vs. Tricou*, 36 La. Ann. 520, and supported by an elaborate and extended argument. We will premise these remarks by stating that the *dicta* announced in *Henry vs. Tricou* has been called to our attention for the first time in this application. It certainly is in conflict with our ruling in this case, but we feel bound to overrule that decision. It is couched in dogmatic terms and supported by thoughtful reasons, and has not been followed by confirmatory precedent. With the utmost desire to preserve uniformity in the rulings of this court, especially upon points of practice, a hasty departure from sound and

logical principles ought not to compel us, in the language of Chief Justice Black, "to stumble again every time we come to the place "where we stumbled before." We note the statement in the application to the effect that our opinion is slightly in error in saying "that "the appeal taken to the Circuit Court *had been lodged* (our italics) "in that court before the appeal was returned into this court," &c., counsel's insistence being that the record shows that orders of appeal were simultaneously granted and appeal bonds to this court and the Circuit Court simultaneously filed, thus vesting jurisdiction in each of said courts simultaneously. On this hypothesis counsel say: "Then it "necessarily follows that the appeal was lodged in the Supreme Court "at the same time and in the same manner that it was lodged in the "Circuit Court," &c. While the filing of the appeal bond certainly divests the jurisdiction of the court of first instance, and presumably, at least, vests the appellate court with jurisdiction, yet the appellate court is fully vested with the power of determining when an appeal is properly brought before it. No other court or tribunal is competent to do so, and in order to determine that question in this case we think we must examine and be controlled by the order of appeal. Looking into the order of appeal, we find that the Circuit Court appeal was made returnable on the first Monday of June, 1893, while the appeal taken to this court was made returnable to this court on the second Monday of June, 1893, just a week later. If the appellants pursued the tenor of this order of appeal and filed a transcript in each one of the appellate courts on the respective return days, it is evident that, as our opinion states, "the appeal taken to the Circuit Court had been "lodged in that court before the appeal was returned into this court." The clerk's indorsement on the transcript shows same to have been filed on June 13th, 1893, which was the second day of the present term, or eight days subsequent to the return day of the appeal in the Circuit Court. Appellee's motion to dismiss appeal was filed in this court June 14th, and the case was argued and submitted on that day. To this motion is appended the certificate of the clerk to the effect that the appeal had been prosecuted to the Circuit Court, and that the case had been argued and submitted in said court, and was at the time under advisement by the judges thereof. It is manifest that the statement of our opinion was strictly correct. In our opinion appellee's motion does not involve a question of jurisdiction, but the question of the appellants' right to bring up an appeal to this court during the pendency of another appeal in the Circuit Court. If this court should proceed with the case and decide it, we might be confronted with a different judgment rendered by the Circuit Court. True it is that the Circuit Court might, through courtesy, suspend its judgment so as to conform to our own, but there is no assurance of that course being pursued, nor could this court expect the Circuit Court so to do. But this is an argument *ab inconvenienti*. The proposition of appellants' counsel involves the philosophical impossibility of two

bodies occupying the same place at the same time. There cannot be such a thing as a suit being in two courts at one and the same time. This the appellants have attempted to do, and we simply decline to take cognizance of the appeal they have lodged in this court, since their appeal in the same case was lodged in the Circuit Court. We have gone very far—possibly too far—in permitting such radically inconsistent pleading as the taking of two self-contradictory orders of appeal from the same judgment to two different courts at the same time. No express provision of law sanctions such a practice, and we have given it our approval only to relieve parties from the responsibility of deciding in advance doubtful questions of jurisdiction, and to relieve them from the unfortunate consequences resulting in case the order of appeal first returned and presented for action should be annulled for want of jurisdiction. In that case the second order of appeal would remain in force, and might be prosecuted without encountering any conflict of jurisdiction. But to claim that a party who has lodged and is actually prosecuting an appeal in the Circuit Court can afterwards, and while that appeal is still pending, return into this court another appeal identical in every respect, is to demand what we characterize as a "legal impossibility," and we cannot demonstrate this more completely than was done in our original opinion.

Rehearing refused.

It is manifest that these authorities lay down the true doctrine. If, after an appeal to one tribunal, another tribunal were to entertain a second appeal by the same party there would be anomaly of two courts, each entertaining the suit, each having a right to enter a decree, and each having a right to enforce its decree, even though the two decrees might be different. In the present case, if the Supreme Court has jurisdiction by reason of the alleged constitutional questions, its jurisdiction also extends over all the other questions in the case, and it must hear and decide them. (*Chappell vs. The United States*, 160 U. S., 499.) The Circuit Court of Appeals if it refused to dismiss the second appeal also had jurisdiction to decide the questions raised by it. No appeal would lie from the Circuit Court of Appeals, and the result might be two different judgments by courts of final resort. It has been suggested that the Circuit Court of Appeals could entertain the appeal, but could suspend argument or decision until the Supreme Court had heard the first appeal. The argument, however, that

the Circuit Court of Appeals has the discretion, as a matter of courtesy or convenience, to suspend the hearing of the appeal, involves, *ex necessitate*, the counter proposition that it has the discretion also to hear and determine the appeal, which would lead to the absurd and inadmissible results already pointed out. If, on the other hand, it is contended that the Circuit Court of Appeals has not the discretion to suspend the hearing of the appeal, but is obliged to do so, then the absurd result is reached that one party may appeal to a court of final jurisdiction which is bound to refuse to the other party the right of a final hearing and determination until some other court shall have decided another appeal. It would be a novel spectacle to see a court bound to entertain an appeal and yet bound to suspend all action upon the appeal until some other court had taken action, and it can readily be seen what an opportunity for oppression this would give to a party desirous of delay. By taking an appeal to the Supreme Court and then a subsequent appeal to the Circuit Court of Appeals he would prevent the appeal to the latter court from being heard at the time when it was entitled to a hearing, and would secure the additional delay required for the hearing and determination or dismissal of his appeal to the Supreme Court.

The appellant in this case does not even have the poor excuse of hardship for the novel practice which it thus seeks to establish. It had its option either to appeal to the Circuit Court of Appeals or to appeal to the Supreme Court under section fifth of the Act of March 3d, 1891, which provides:—

Appeals or writs of error *may* be taken from the District Courts or from the existing Circuit Courts direct to the Supreme Court in the following cases * * * in any case that involves the construction or application of the Constitution of the United States.

The appellant took an appeal to the Supreme Court, which secured there a hearing of all the questions involved, provided those questions included a question arising under the Constitution of the United States; but it also ran the

risk that if those questions did not include a constitutional question, the Supreme Court must in the end dismiss the appeal without regard to the merits. On the other hand, appellant might have taken an appeal to the Circuit Court of Appeals, in which case it would have equally secured a hearing on all the questions involved, and could have had any constitutional questions certified by the Circuit Court of Appeals to the Supreme Court. In the case of an appeal to the Circuit Court of Appeals, appellant ran no risk of having its appeal dismissed without a hearing on the merits, as the Circuit Court of Appeals had in any event jurisdiction because of the questions involved other than constitutional questions. There were, therefore, two courses open to the appellant, one involving a risk of a dismissal without a hearing on the merits, the other involving no such risk. Appellant chose the former course, and it did this with its eyes open, as its application for a writ of error was opposed and argued. There was no hardship in putting appellant to its election between these two remedies, and no reason for giving it both. On the contrary, there was every reason, as was pointed out in *McLish vs. Roff*, 141 U. S., 661, already cited, for holding it to its election. The court was there dealing with a case involving a jurisdictional and not an alleged constitutional question, but the reasoning applies to both cases, and the parallel drawn by the court between the two classes of cases in the opinion shows that the court considered them to rest on the same foundation, that language being as follows:—

But there is an additional reason why the omission of the word *final* in the fifth section of the Act should not be held to imply that the purpose of the Act is to extend the right of appeal to any question of jurisdiction in advance of the final judgment, at any time it may arise in the progress of the cause in the court below. Such implication, if tenable, cannot be restricted to questions of jurisdiction alone. It applies equally to cases that involve the construction or application of the Constitution of the United States, and to cases in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority is drawn in question, and to those in which the Constitution or law of a

State is claimed to be in contravention of the Constitution of the United States. Under such a construction all these most important classes of cases could be directly taken by writ of error or appeal, as the case may be, to this court, independently of any final judgment upon them. The effect of such a construction, if sanctioned, would subject this court to the needless delays and labor of several successive appeals in the same case, which, with all the matters in controversy in it, by awaiting the final judgment, could be promptly decided in one appeal.

It is submitted, therefore, that the appeal to the Circuit Court of Appeals was invalid, and that the motion of the appellee to dismiss it should have been granted. To hold otherwise would be to sustain in all future cases the power of a court to entertain (and *ex necessitate* the power to decide) an appeal during the pendency of a prior appeal by the same party on the same questions to another court. There is no necessity for such an anomalous ruling and no warrant for it either in principle or authority.

The learned justice who delivered the opinion in the Circuit Court of Appeals in this case, while admitting that the general rule is as contended for by appellee, was of opinion that the Act of 1891 allowed two appeals at the same time by the same party, one to the Supreme Court and one to the Circuit Court of Appeals. It is submitted, however, that there is nothing in the Act itself to suggest any such construction, and that to add such a provision to the Act is judicial legislation rather than construction.

If either appeal was valid was the decree appealed from erroneous?

This branch of the case will be discussed under three propositions, viz.:—

1. PULLMAN'S PALACE CAR COMPANY HAVING FILED A BILL ALLEGING, *inter alia*, THE INVALIDITY OF THE LEASE, PRAYING THE AID OF THE COURT TO DETERMINE WHAT PROPERTY COULD BE RETURNED, HOW IT SHOULD BE RETURNED AND WHAT COMPENSATION SHOULD BE MADE FOR PROPERTY NOT CAPABLE OF

RETURN, AND TENDERING SUCH EQUITABLE RELIEF OR COMPENSATION AS SHOULD BE FIXED BY THE COURT, AND HAVING OBTAINED UNDER THE BILL RELIEF AGAINST THE CENTRAL TRANSPORTATION COMPANY BY A DECREE OF INJUNCTION, COULD NOT AFTER SUCCESSFULLY ESTABLISHING THE INVALIDITY OF THE LEASE DISCONTINUE ITS OWN BILL AND PREVENT THE COURT FROM ENTERTAINING A CROSS BILL OR ADMINISTERING THE EQUITABLE RELIEF TENDERED.

2. THE TWO COMPANIES HAVING IN GOOD FAITH, AND UNDER THE ADVICE OF COMPETENT COUNSEL, EXECUTED A LEASE IN PURSUANCE OF A STATUTE DRAWN TO AUTHORIZE THE LEASE, AND WHICH BOTH PARTIES SUPPOSED DID AUTHORIZE IT, THE COMPANY IN POSSESSION OF THE PROPERTY IF IT SETS UP THE INVALIDITY OF THE LEASE MUST RESTORE, OR MAKE EQUITABLE COMPENSATION FOR, THE PROPERTY.

3. UNDER ALL THE EVIDENCE THE MEASURE OF COMPENSATION FIXED BY THE DECREE OF THE COURT BELOW WAS A MINIMUM ONE, AND TO QUOTE THE LANGUAGE OF THE CONCURRING OPINION OF JUDGE DALLAS, "QUITE AS FAVORABLE TO THE PULLMAN COMPANY AS UPON ANY POSSIBLE VIEW OF "THE FACTS AND THE LAW COULD REASONABLY HAVE BEEN "REACHED."

These propositions will be considered separately.

1. PULLMAN'S PALACE CAR COMPANY HAVING FILED A BILL ALLEGING, *inter alia*, THE INVALIDITY OF THE LEASE, PRAYING THE AID OF THE COURT TO DETERMINE WHAT PROPERTY COULD BE RETURNED, HOW IT SHOULD BE RETURNED AND WHAT COMPENSATION SHOULD BE MADE FOR PROPERTY NOT CAPABLE OF RETURN, AND TENDERING SUCH EQUITABLE RELIEF OR COMPENSATION AS SHOULD BE FIXED BY THE COURT, AND HAVING OBTAINED UNDER THE BILL RELIEF AGAINST THE CENTRAL TRANSPORTATION COMPANY BY A DECREE OF INJUNCTION, COULD NOT AFTER SUCCESSFULLY ESTABLISHING THE INVALIDITY OF THE LEASE DISCONTINUE ITS BILL AND PREVENT THE COURT FROM ENTERTAINING A CROSS BILL OR ADMINISTERING THE EQUITABLE RELIEF TENDERED.

But little need be said in addition to the opinion of the court below on this point, found at page 552 of the record. Ordinarily, in equity as in law, a plaintiff will be allowed to discontinue his proceedings, and the mere fact that the defendant may thereby be put to the annoyance of a new suit for the same cause of action will not prevent the exercise of this right. There is, however, this distinction between actions in equity and actions at law. In equity the court sometimes gives relief by injunction or interlocutory decree prior to the final adjudication of the cause, and by such action the situation of the parties is changed. In equity also, in many cases, not alone is the plaintiff entitled to relief, but the defendant is entitled to affirmative relief against the plaintiff. It follows that in suits in equity it sometimes happens that to allow the plaintiff to dismiss his bill would be to inflict an injury on the defendant greater than the mere inconvenience of being subjected to a second suit. Such discontinuance, therefore, will not be allowed by the court where it would be prejudicial to the rights which the defendant has acquired in the progress of the cause. This rule is stated in the latest work on equity practice, viz.:—

Beach on Modern Equity Practice, 450, as follows:—

It is very clear from an examination of the authorities, English and American, that the right of a complainant to dismiss his bill without prejudice on payment of costs is of course, except in certain cases. These exceptions were broadly stated by Chancellor Harper, of South Carolina, in *Bank vs. Rose*, 1 Rich Eq. 294, as follows: "The exception, stated in general terms, is that it is within the discretion of "the court to refuse him permission to do so if a dismissal would work "a prejudice to the other parties; and I gather from the cases, com- "pared with each other, that it is not regarded as such prejudice to a "defendant that the complainant, dismissing his own bill, may at his "pleasure harass him by filing another bill for the same matter. But "whenever in the progress of a cause a defendant entitles himself to a "decree, either ⁱⁿ the complainant or ^{against} a co-defendant, and "a dismissal would put him to the expense and trouble of bringing a "new suit and making his proofs anew, such dismissal will not be "permitted."

In the case of

Booth vs. Leycester, 1 Keen, 255,
before the Master of the Rolls (Lord Langdale), the English practice is thus stated:—

His Lordship had a strong impression at first that a plaintiff might dismiss his own cause upon payment of costs at any time; but upon inquiring into the practice he found the rule to be otherwise, and it was certainly quite reasonable that a plaintiff ought not to have the power of dismissing his bill when, by so doing, he might prejudice the defendant.

In the case of

Stevens vs. The Railroads, 4 Fed. Rep., 97 (1880), the United States Court for the Western District of Tennessee (Hammond, D. J., delivering the opinion), after an exhaustive review of the authorities, held that the case *Booth vs. Leycester*, already cited, correctly stated the practice in equity, and that the right to dismiss was not absolute, but must be denied where, under the circumstances of the case, it would work a prejudice to the defendant. The court in its opinion said:—

The case of *Booth vs. Leycester* is conclusive against the position that the right protected by this exception must arise out of some order or decree entered in the case. It may arise out of any proceeding in it, and may be found in the nature of the defense, the condition of the pleadings, the agreement of the parties, or any circumstances appearing of record in the case which show that it would be inequitable to allow the dismissal.

In the case of

Chicago, &c., R. R. Co. vs. Union Roll Mill Co.,
109 U. S., 702 (1884), the question of the right of a plaintiff to dismiss a bill came before the Supreme Court of the United States, and the court (Mr. Justice Woods delivering the opinion) said:—

It may also be conceded that, as a general rule, a complainant in an original bill has the right at any time, upon payment of costs, to dismiss his bill. But this latter rule is subject to a distinct and well-settled exception, namely, that after a decree, whether final or interlocutory, has been made, by which the rights of a party defendant have

been adjudicated or such proceedings have been taken as entitle the defendant to a decree, the complainant will not be allowed to dismiss his bill without the consent of the defendant.

The rule is stated as follows in Daniell's Chancery Practice, page 793, fifth Am. Ed.:—

"After a decree or decretal order the court will not allow a plaintiff "to dismiss his own bill unless upon consent, for all parties are interested in a decree, and any party may take such steps as he may be advised to have the effect of it."

The same writer, page 794, says that—

"After a decree has been made, of such a kind that other persons "besides the parties on record are interested in the prosecution of it, "neither the plaintiff nor defendant, on the consent of the other, can "obtain an order for the dismissal of the bill."

The rule, as we have stated it, is sustained by many adjudicated cases. It was laid down by the Lord Chancellor in *Cooper vs. Lewis*, 2 Phillips, Ch. 181, as follows:—

"The plaintiff is allowed to dismiss his bill on the assumption that it "leaves the defendant in the same position as he would have stood if "the suit had not been instituted; it is not so where there has been a "proceeding in the cause which has given the defendant a right against "the plaintiff."

In *Bank vs. Rose*, 1 Rich. Eq. (S. C.), 294, it was said:—

"But whenever, in the progress of a cause, the defendant entitles "himself to a decree, either against a complainant or a codefendant, "and the dismissal would put him to the expense and trouble of bringing a new suit or making new proofs, such dismissal will not be "permitted."

So in the case of *Connor vs. Drake*, 1 Ohio St., 170, the Supreme Court of Ohio declared:—

"The propriety of permitting a complainant to dismiss his bill is a "matter within the sound discretion of the court, which discretion is "to be exercised with reference to the rights of both parties, as well "the defendant as the complainant. After a defendant has been put to "trouble in making his defense, if, in the progress of the case, rights "have been manifested that he is entitled to claim, and which are valuable to him, it would be unjust to deprive him of them merely because "the complainant might come to the conclusion that it would be "for his interests to dismiss his bill. Such a mode of proceeding would "be trifling with the court as well as with the rights of defendants. We "think the court did not err in its ruling in refusing to permit complainant to dismiss his bill."

Chancellor Walworth, in the case of *Wall vs. Crawford*, 11 Paige, 472, laid down the rule in these words:—

"Before any decree or decretal order has been made in a suit in chancery, by which a defendant therein has acquired rights, the complainant is at liberty to dismiss his bill upon payment of costs; but

"after a decree has been made by which a defendant has acquired rights, either as against a complainant or against a codefendant in the suit, the complainant's bill cannot be dismissed without destroying those rights. The complainant in such a case cannot dismiss without the consent of all parties interested in the decree, nor even with such consent without a rehearing, or upon a special order to be made by the court."

See also *Guilbert vs. Hawles*, 1 Ch. Cas., 40; *Bluck vs. Colnaghi*, 9 Sim. Ch., 411; *Lashley vs. Hogg*, 11 Ves. Jr., 602; *Booth vs. Leycester*, 1 Keen's Ch., 255; *Biscoe vs. Brett*, 2 Vesey & B., 377; *Collins vs. Greaves*, 5 Hare, 596; *Gregory vs. Spencer*, 11 Beav., 143; *Carrington vs. Holly*, 1 Dick, 280; *Anon.*, 11 Ves. Jr., 169; *Cozzens vs. Sisson*, 5 R. I., 489; *Opdyke vs. Doyle*, 7 R. I., 461; *The Atlas Bank vs. The Nahant Bank*, 23 Pick., 491; *Bethia vs. M'Kay*, Cheve's Eq. (S. C.), 96; *Sayer's Appeal*, 79 Penn. St.; *Seymour vs. Jerome*, Walk. Mich. Ch., 356.

In the case of
Electrical, &c., Co. vs. Brush, &c., Co., 44 Fed. Rep., 602 (1890),
the court (Brown, J., delivering the opinion) said:—

While there is no doubt of the general proposition that a plaintiff in an equity suit may dismiss his bill at any time before the hearing, it is equally well settled that he cannot do so without an order of court; a practice which implies a certain discretion on the part of the court to refuse such order if, under the particular facts of the case, a dismissal would be prejudicial to the rights of the defendant.

After quoting the authorities, the court then added:—

Upon a full examination of all the cases upon this subject, we have come to the conclusion that leave to dismiss a bill should not be granted where, beyond the incidental annoyances of a second litigation upon the subject matter, such action would be manifestly prejudicial to the defendant.

This case was followed in
Hat-sweat, &c., Co. vs. Waring, 46 Fed. Rep., 87 (1891).

In the case of
W. U. Tel. Co. vs. Am. Bell Tel. Co., 50 Fed. Rep., 662 (1892),
the court (Colt, C. J., delivering the opinion) said:—

We have, therefore, this single proposition to decide—whether, under these circumstances, the complainants are entitled to dismiss their bill without prejudice, upon payment of costs, and this is a question purely of equity practice. It is admitted that, under equity rule 90, this court is governed by the equity practice of the High Court of Chancery of England as it existed in 1842, the time of the adoption of the rule. Under that practice the general rule was that a complainant might dismiss his bill upon payment of costs at any time before interlocutory or final decree, and this has been the general practice both in the Federal and State courts. There are, however, certain well-recognized exceptions to this rule, and the question which arises upon this motion is whether the defendant comes within any of these exceptions. These exceptions are based upon the principle that a complainant should not be permitted to dismiss his bill when such action would be prejudicial to the defendant. But this does not mean that it is within the discretion of the court to deny the complainant this privilege under any circumstances where it might think such dismissal would work a hardship to the defendant, as, for example, where it might burden him with the trouble and annoyance of defending against a second suit; but it means that if, during the progress of the case, the defendant has acquired some right, or if he seeks or has become entitled to affirmative relief, so that it would work an actual prejudice against him to have the case dismissed, then the complainant will not be permitted to dismiss his bill. To hold otherwise would be to do away with the general rule altogether, and to make the question simply one of discretion on the part of the court. Where issues are framed out of chancery and decided by a jury, that would be such a determination of the case as to forbid the complainant to dismiss his bill without prejudice, because the defendant has acquired a new right; and so where a Master has filed his report and his findings are against the complainant, I do not think for the same reason he should be allowed to dismiss his bill. Again, where the defendant has filed a cross bill or where he seeks affirmative relief in his answer, or where, without specifically asking for affirmative relief in his answer, the evidence discloses that he is entitled to such relief, these are instances where the complainant should not be allowed to dismiss his bill; but where there has been no interlocutory or final decree, and no determination of the cause in any way, and the defendant seeks no affirmative relief, or, in other words, where the bringing of another suit will merely submit him to the annoyance of a second litigation, the complainant has a right to dismiss his bill without prejudice upon payment of costs.

In the case last cited the court, while correctly stating the principles governing this class of cases, failed to carry these principles to their logical conclusion, and allowed

complainant to dismiss its bill after a reference to a Master. Upon appeal the Circuit Court of Appeals reversed the judgment and held that the complainant could not dismiss the bill, saying:—

The single question contested is the right of the complainants thus to dismiss their bill. To the discussion of this question great learning and extensive examination of the authorities have been devoted; but in the opinion of this court the question lies in narrow compass. All the authorities recognize that in the progress of a suit a stage may be reached when the right of the complainant to end the cause by dismissing his bill ceases. With sufficient exactness, the decisive point may be said to be when the cause has proceeded so far as to give the defendant rights of which he would be deprived by allowing the dismissal of the bill by the complainant on his motion. Such rights were acquired in this cause by the reference of the parties to the Master, approved and confirmed by the decretal order of the court.

American Bell Telephone Co. vs. Western Union Telegraph Co., 69 Fed. Rep., 666 (1895).

Application was subsequently made to the Supreme Court of the United States for a *certiorari* in this case, which application was refused.

American Bell Telephone Co. vs. Western Union Telegraph Co., 166 U. S., 721.

In the case of

Hershberger vs. Blewett, 55 Fed. Rep., 170 (1892), the court (Hanford, D. J.) said:—

The authorities cited do not sustain the solicitor for plaintiffs in maintaining that in equity a plaintiff may dismiss without prejudice, and without consent of the defendant, at any stage of the case, upon payment of costs. In section 291 of Foster's Federal Practice, the learned author says:—

"After appearance, and before a decree or decretal order, a plaintiff can usually obtain a dismissal upon payment of the costs of such of the defendants as have appeared, but not if they, or any of them, would be injured thereby. * * * After a decree or decretal order, however, the plaintiff may not discontinue without the consent of all parties who have acquired rights by the decree."

In the case of

Detroit vs. Detroit City Ry. Co., 55 Fed. Rep., 569
(1893),

the court (Taft, C. J., delivering the opinion), in refusing a motion to dismiss, said:—

It is very clear from an examination of the authorities, English and American, that the right of a complainant to dismiss his bill without prejudice, on payment of costs, was of course except in certain cases. *Chicago, &c., A. R. Co. vs. Union Rolling Mill Co.*, 109 U. S., 702. The exception was where a dismissal of the bill would prejudice the defendants in some other way than by the mere prospect of being harassed and vexed by future litigation of the same kind.

Applying the principles laid down by the above authorities to the present case, it is quite clear that the order of the court refusing permission to dismiss, and allowing the defendant to file a cross bill, was eminently proper. The bill was one which tendered relief to the defendant. It denied the right of the defendant in the bill to proceed at law against the plaintiff, and in lieu thereof tendered it affirmative relief in equity. Upon the tender of such relief, and the prayer to the court to administer it, the plaintiff obtained from the court an injunction restraining the defendant from certain legal proceedings. One of the grounds on which the plaintiff obtained the injunction and tendered affirmative relief to the defendant, was that the original contract was invalid and could not be carried out. After obtaining the injunction, and after over four hundred printed pages of testimony had been taken in the cause, the plaintiff now seeks to dismiss his bill, deprive defendant of the benefit of that testimony, and deprive defendant of the affirmative relief to which it is entitled. To do this would be to greatly prejudice the defendant's right. The loss which the defendant would suffer would not be simply the inconvenience of being subjected to the possibility of another suit, but would be the deprivation of a right to which it is entitled in this suit, namely, a decree for affirmative relief based partly on testimony already taken. The equity of the defendant is so strong,

and the action which the plaintiff seeks to take is so inequitable, that the language of the Supreme Court in the case of *Chicago, &c., R. R. Co. vs. Union Rolling Mill Co.*, 109 U. S., 702-716, is directly applicable:—

If the court under these circumstances had allowed the original bill to be dismissed without the consent of the Rolling Mill Company, it would have inflicted a palpable wrong on that company and trifled with the administration of justice.

It has been urged on behalf of Pullman's Palace Car Company as a reason why the court should have allowed it to dismiss its own bill, and should have refused to allow the cross bill to be filed, that the claim of the Central Transportation Company was a money claim for which there was a remedy at law both adequate and appropriate. To this there are two answers: First, that it was too late for the Pullman Company to deny the jurisdiction of equity; and, second, that the claim was one in which a court of equity certainly had concurrent and probably had exclusive jurisdiction.

Wherever a court of equity has with the acquiescence of the parties once taken jurisdiction for the purpose of administering relief, it looks with disfavor upon any objections by either party to its jurisdiction, and unless the case is entirely outside the scope of equity jurisdiction, it will not allow either party to object to the tribunal whose decision such party has invoked or acquiesced in. This is the law both in England and America.

In the case of

Duke of Leeds vs. The Corporation of New Radnor,
2d Brown's Chanc. Reps., 402,

Lord Chancellor Thurlow, in reversing a decree of the Master of the Rolls refusing jurisdiction, said:—

In this case the decree is not tenable, because the defendants have by their answer admitted the plaintiff's right, and the court, by retaining the bill for a year, has admitted that the relief lies in equity. To send it to law, only to try whether there is a remedy there, would not be that measure of justice which the court ought to give; therefore the account must proceed.

In the case of

Kilbourn *vs.* Sunderland, 130 U. S., 505,
the Supreme Court of the United States (Mr. Chief Justice
Fuller delivering the opinion) said:—

The point is also pressed that the remedy at law was plain, adequate and complete, and jurisdiction in equity therefore wanting. We do not understand counsel to repudiate the stipulation or to suggest multifariousness or any objection arising upon the rather unusual mode pursued to secure a conclusion in four cases rolled into one, but to contend that the determination of all the matters in issue belongs on the law side of the court. The defendants fully answered the bill, and raised no such objection, and, the cause being at issue, and evidence taken, it was ordered on the 23d of February, 1883, by consent, to be heard by the general term in the first instance. On the 24th of March, 1884, the defendant moved to dismiss on the ground of the adequacy of the remedy at law.

We have had occasion recently to remark that where it is competent for the court to grant the relief sought, and it has jurisdiction of the subject matter, this objection should be taken at the earliest opportunity and before the defendants enter upon a full defense. *Reynes vs. Dumont, ante*, 354. By stipulation several suits had in effect been consolidated with the intention, by consent, of adjusting the conflicting claims between Sunderland and Hillyer jointly and Sunderland alone, and Kilbourn, Latta and Olmstead, and Latta alone, and the parties had proceeded in their pleadings upon that theory, and taken all the evidence, and had the cause set down for hearing. It is then suggested that Sunderland and Hillyer and Sunderland cannot maintain their suit in equity, but must be remitted to actions at law. We do not agree with this view.

The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would confer under the same circumstances. The parties stood in a fiduciary relation towards each other, and, in the course of the transactions between them, from thirty to forty different lots of ground were bought for the complainants in upwards of fifteen distinct purchases. As to five of these purchases fraud is specifically charged. A considerable amount of complainants' money was in defendants' hands, and a counter claim was set up by them in relation to services performed in and about the care of a portion of the property purchased; services covering many payments for taxes, interest, &c.; making of loans and procuring renewals; receipts and advances. The transactions were all parts of one general enterprise, and the claims of a character involving trust relations. Before the severance of the connections between the parties, Kilbourn and Latta dissolved, and the amounts due from Kilbourn

and Latta, if any, and from Latta alone, if any, to Sunderland and Hillyer or to Sunderland, and the offsets and counter claims of Kilbourn and Latta or of Latta, all sprang from one series of operations, and required an accounting on both sides, and that accounting, until disentangled by the investigation of the court, was apparently complicated and difficult. "There cannot be any real doubt that the 'remedy in equity, in cases of account, is generally more complete "and adequate than it is or can be at law."

In the case of

Brown vs. Lake Superior Iron Co., 134 U. S., 530, the Supreme Court of the United States (Mr. Justice Brewer delivering the opinion) said:—

But the maxim, "He who seeks equity must do equity," is as appropriate to the conduct of the defendant as to that of the complainant; and it would be strange if a debtor, to destroy equality and accomplish partiality, could ignore its long acquiescence and plead an unsubstantial technicality to overthrow protracted, extensive and costly proceedings carried on in reliance upon its consent. Surely no such imperfection attends the administration of a court of equity. Good faith and early assertion of rights are as essential on the part of the defendant as of the complainant. This matter has recently been before this court in *Reynes vs. Dumont*, 130 U. S., 354, 395, and was carefully considered, and the rule, with its limitations, thus stated: "The rule as stated in 1 Daniell's Chancery Practice, 555, "4th Am. ed., is that if the objection of want of jurisdiction in equity "is not taken in proper time, namely, before the defendant enters into "his defense at large, the court, having the general jurisdiction, will "exercise it; and in a note on page 550, many cases are cited to estab- "lish that 'if a defendant in a suit in equity answers and submits to "the jurisdiction of the court, it is too late for him to object that "the plaintiff has a plain and adequate remedy at law. This ob- "jection should be taken at the earliest opportunity. The above rule "must be taken with the qualification that it is competent for the "court to grant the relief sought, and that it has jurisdiction of the "subject matter.'

In the case of

Perego vs. Dodge, 163 U. S., 160, under a bill filed by complainant to which the defendant answered asking for affirmative relief, the court entered a decree for the defendant, giving such affirmative relief, and the complainant thereupon took the ground that the court ought not to have granted the relief because there

was an adequate remedy at law. The Supreme Court of the United States (Mr. Chief Justice Fuller delivering the opinion) said:—

We are of opinion that it was competent for the district court to grant the relief sought, and that it had jurisdiction of the subject matter. Plaintiff, having voluntarily invoked the equity jurisdiction of the court, was not in a position to urge, on appeal, that his complaint should have been dismissed because of adequacy of remedy at law.

Even, therefore, if the jurisdiction of the court in the present case was not clear, it would not be in the mouth of the plaintiff who had invoked that jurisdiction and obtained relief under it, to now deny it.

The jurisdiction of the court, however, is not doubtful. The claim of the Central Transportation Company was not in its inception a mere money demand. On the contrary, as was alleged by the Pullman Company in its bill, the Central Transportation Company was the owner of property which had been delivered under a void lease, and which the Pullman Company professed itself willing to return as far as practicable. The Pullman Company in its bill alleged that part of the property existed in specie, part was in a converted form, and part could not be returned at all. It alleged that it was willing to return the property that was in specie, to do what was equitable with that which was in a converted form, and to make compensation for what could not be returned; but that the aid of a court of equity was necessary to determine what would be restitution or compensation. It prayed:—

That this court will lend its aid to your orator in making the surrender of demised property to the defendant and relieve your orator from the embarrassments set forth in this bill; and that the court will declare by its decree the rights of the defendants, if any, in the said contract with the Pennsylvania Railroad Company, and make such disposition thereof as may be equitable; and that it may be held that your orator is not bound or holden to more than just compensation to the defendant for such of the demised property as cannot be actually restored or in literal compliance with the terms of said lease;

and

that the court may consider and decree whether said contract of lease was not made without authority of law on the part of the defendant,

and in excess of its corporate powers and in violation of its corporate duties, so as not to be enforceable against your orator beyond the obligation of your orator to make return of or just compensation for the property demised; and that an account may be taken between your orator and the defendant, and that the amount may be ascertained that should be paid by your orator to the defendant on any account whatever;

and that the court might

direct and adjudge as to how said surrender shall be made and carried out, or what compensation shall be made in lieu of surrender where surrender has become impracticable or impossible as in this bill set forth; and that an accounting may be had between your orator and defendant as to all the matters and things set out in this bill.

(Record, page 22.)

Under these circumstances, how could the Central Transportation Company have sued at law? It could not have sued on an *indebitatus assumpsit*, since the Pullman Company was merely bailee of property. It could not sue for conversion or use, since the Pullman Company alleged its willingness to return the property and asked a court of equity to aid it in making such return. It subsequently turned out indeed, from the evidence, that the plant of the Central Transportation Company had been so thoroughly absorbed by the Pullman Company that no property existed in its original form, and that no relief was possible but the giving of a money decree as compensation; but this, at the time when the Pullman Company repudiated the lease, could not have been foretold, and was the result of an investigation into the accounts of the two companies, only possible in a court of equity. It would be surprising if a complainant, professing his willingness to make equitable restitution or compensation and invoking the aid of a court of equity to investigate and determine how he could make it, should be allowed afterwards to object to the jurisdiction of the court because as a result of the accounting it was found impracticable to give other than pecuniary relief.

It is submitted, therefore, that irrespective of any technical questions as to whether complainant could or could

not dismiss the original bill, and as to whether the cross bill was to be considered as a cross bill or an original bill, the Central Transportation Company is entitled to relief because under the facts set up by complainant in its original bill, only a court of equity could do justice between the parties; and when the complainant had established the fact that the lease was illegal and void, the defendant was entitled to have the court of equity administer the relief tendered.

THE TWO COMPANIES HAVING IN GOOD FAITH, AND UNDER THE ADVICE OF COMPETENT COUNSEL, EXECUTED A LEASE IN PURSUANCE OF A STATUTE DRAWN TO AUTHORIZE THE LEASE, AND WHICH BOTH PARTIES SUPPOSED DID AUTHORIZE IT, THE COMPANY IN POSSESSION OF THE PROPERTY, IF IT SETS UP THE INVALIDITY OF THE LEASE, MUST RESTORE, OR MAKE EQUITABLE COMPENSATION FOR, THE PROPERTY.

The facts of the case are that the Central Transportation Company and Pullman's Palace Car Company, two corporations about equal in size, and having properties of about equal value, desired to consolidate, and after consultation the best method of uniting the businesses was believed to be by the lease of one to the other. Eminent counsel was employed, who drafted an Act of Assembly for the purpose of authorizing the lease. That Act was passed, and both parties for fifteen years carried out the lease in good faith, believing it to be valid. In the meanwhile the property of the Central Transportation Company, consisting of cars, equipment and contracts, covering an extensive system of sleeping-car transportation, was so incorporated in the business of Pullman's Palace Car Company, by substitution of cars, renewal or substitution of contracts and general merger of lines and business, that it was impossible to separate the two. The united business had been exceedingly prosperous, and the united plant, consisting of the two systems consolidated, was more valuable than ever. After the fifteen years of amicable relations the parties quarreled over the lease. The Central

Transportation Company brought suits at law under the lease, and Pullman's Palace Car Company filed the present bill in equity, alleging, *inter alia*, that the lease itself was *ultra vires* and void, and asked the court to enjoin the proceedings at law, take an account of the property, and ascertain what would be just compensation for such property as could not be returned. In order that the court may see that this allegation and prayer for relief was a substantial part of the bill it is here reprinted, as follows:—

And your orator shows that in said lease it is recited that the said contract of lease is made on the part of the defendant, the said Central Transportation Company, under an Act of the General Assembly of the Commonwealth of Pennsylvania therein named, approved the ninth day of February, A. D. 1870, a copy whereof is hereto attached, marked "Exhibit G," and referred to as a part of this bill; but your orator is advised, and therefore submits it to the court, that the said lease, being a grant, assignment and transfer of all the property, contracts and rights of the said defendant, the Central Transportation Company, and including a covenant on the part of said defendant corporation not to transact, during the existence of said lease, any of the business for the transaction of which it was incorporated, was never legally valid between the parties thereto, but was void for the want of authority and corporate power on the part of defendant to make the said contract of lease, and because the same was in violation of the charter conferring the corporate powers of said defendant, and of the purpose of its incorporation, as by the said charter, to which, for greater certainty, reference is made, your orator is advised it will appear; that the said contract of lease was never susceptible of being enforced in law by your orator against said defendant, and cannot, therefore, be construed and held to continue in force and obligatory upon your orator; and that your orator can be under no other legal obligation or equitable duty to the defendant than to return such of the property assumed to be demised as is capable of being returned, and to make just compensation for such other of the said property as, under the said contract of lease, it ought to make compensation for, which it is willing and now offers to do. * * *

That the court may consider and decree whether said contract of lease was not made without authority of law on the part of the defendant, and in excess of its corporate powers, and in violation of its corporate duties, so as not to be enforceable against your orator beyond the obligation of your orator to make return of or just compensation for the property demised; and that an account may be taken between your orator and the defendant, and that the amount may be ascertained that should be paid by your orator to the defendant on any account whatever.

Under this bill filed by Pullman's Palace Car Company the court granted an injunction against further actions at law under the lease; but inasmuch as some of the questions raised by the bill could be decided in the common-law suits already brought, it refused to enjoin those suits, but allowed them to go on. In the course of those suits, the Pullman Company succeeded in obtaining a judgment that the lease was *ultra vires* and void. It now contends that the result of such a decision is that the court of equity cannot take an account, or decree compensation; but that, on the contrary, the lease was so immoral that neither of the wicked corporations who made it can obtain any relief whatever against the other, and that the corporation in possession which successfully raised the question of invalidity can thereby retain all the property of the other, without account or compensation. It is submitted that this is neither the effect of the Supreme Court decision in the action at law, nor is it the general principle established by other authorities. In the action at law, the Supreme Court in its opinion, so far from holding that the Pullman Company was entitled to retain without compensation all the benefit of the property received under the lease, intimated directly the contrary. The court said:—

The view which this court has taken of the question presented by this branch of the case, and the only view which appears to us consistent with legal principles, is as follows:—

A contract of a corporation, which is *ultra vires*, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it.

When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact have been complied

with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation nor the other party to the contract can be estopped by assenting to it, or by acting upon it, to show that it was prohibited by those laws. * * *

A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it.

In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms; but on an implied contract of the defendant to return, or, failing to do that, to make compensation for property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract.

The ground and the limits of the rule concerning the remedy, in the case of a contract *ultra vires*, which has been partly performed, and under which property has passed, can hardly be summed up better than they were by Mr. Justice Miller in a passage already quoted, where he said that the rule "stands upon the broad ground that the contract 'itself is void, and that nothing which has been done under it, nor the 'action of the court, can infuse any vitality into it;" and that "where 'the parties have so far acted under such a contract that they cannot 'be restored to their original condition, the court inquires if relief can 'be given, independently of the contract, or whether it will refuse to 'interfere as the matter stands." *Pennsylvania Railroad vs. St. Louis, &c., Railroad*, 118 U. S., 317.

Whether this plaintiff could maintain any action against this defendant, in the nature of a *quantum meruit*, or otherwise, independently of the contract, need not be considered, because it is not presented by this record, and has not been argued. This action, according to the declaration and the evidence, was brought and prosecuted for the single purpose of recovering sums which the defendant had agreed to pay by the unlawful contract, and which, for the reasons and upon the authorities above stated, the defendant is not liable for.

This intimation of the Supreme Court is in direct accordance both with its own decisions and the great current of authorities elsewhere.

An examination of the various cases in which the courts have been called upon to deal with illegal contracts will show that they group themselves under three classes, governed by three distinct principles of law, as follows:—

1. Neither a court of law nor a court of equity will lend its aid to enforce an illegal contract.

2. The court will not aid one who has received the benefit of an illegal contract to recover back the consideration which he paid for such benefit from the other party who has not repudiated the transaction, but has carried it out.

3. Where the contract has not been wholly performed and both parties abandon it, or the party who has received the consideration sets up the illegality in excuse of further performance on his part, a court of equity will lend its aid to rescind the arrangement and restore the *status quo*, as far as possible, by compelling a return of the consideration or its equivalent.

There has been considerable looseness of expression in some of the opinions of the courts in cases involving the question of rights under an illegal contract. In many cases the courts have declared broadly that they will not interfere for the benefit of either party to an illegal contract; but it will be found that such expressions always occur in cases where the court is asked to enforce the illegal contract as such. In other cases, the courts have said that they will not interfere to restore a consideration paid under an illegal contract; but it will be found that this occurs in cases where a party who has received the full benefit of the illegal contract is seeking on the ground of illegality to recover back the consideration which he paid for the benefit he received.

In the cases just mentioned where the courts have declined to interfere they have drawn no distinction between immoral and illegal contracts, since the same principles apply equally to both. Whether a contract be immoral or illegal, or whether it is against the letter or the policy of the law, it is equally true that the courts will not enforce it, nor interfere on behalf of one who, after receiving the full benefit, seeks to recover back the price which he paid for such benefit. In the first case, it is against

public policy to lend the court's aid to the enforcement of that which is contrary to law. In the second case, it is equally against public policy to aid one who has reaped the benefit of his immoral or illegal contract to commit a second wrong by recovering back the consideration.

When, however, the courts have been called upon to deal with the cases in which one who has obtained property under an illegal contract sets up the illegality as an excuse for performance, and *at the same time seeks to retain property received under the contract*, it has been found that the broad and general expressions so frequently used in the first two classes of cases are not applicable. The same public policy which induces the courts to withhold their aid when asked to compel the performance of an illegal contract, or when asked to restore the consideration to one who has had the benefit of it, leads them to grant relief when a party to a contract retains property obtained under it, while at the same time he seeks to avoid performance on the ground of illegality.

In the latter class of cases also all immoral and illegal contracts cannot be treated alike. For example, a contract to commit murder might be held to be so immoral that the parties would forfeit all right to any relief with regard to any matters growing out of it, but the same could not be said of a contract in restraint of trade, which, owing to the conflict of decisions, might be finally declared illegal, although originally entered into with the most praiseworthy motives, and upon the best legal advice as to its validity. It would be a monstrous doctrine that if two parties honestly made a contract which they were advised was legal, the fact that it was afterwards decided to be illegal would prevent the courts from adjusting the equitable rights of the parties with regard to property conveyed under it. It will be found that no such doctrine has been adopted by the courts, and that in the class of cases where one party, on the ground of illegality, repudiates the contract before final performance, the courts have always lent their aid to compel him to account for property of the other party in his possession. The under-

lying principle in such cases was well stated by Vice-Chancellor Stuart in

Bryson *vs.* Warwick, &c., Canal Co., 1 Sm. & Giff.,
447, 469,

as follows:—

It is not consistent with equity that when the whole contract fails, one of the contracting parties should retain that money which was the property of the other contracting parties who had not received the consideration in respect of which alone the money could be properly paid.

This principle has been almost uniformly applied in the third class of cases to which reference has been made, viz., cases in which a party seeks at once to avoid performance by a plea of illegality and to retain the property which he received in consideration of such performance. In such cases the courts interfere not to enforce rights under the contract, but to restore the property or its equivalent, which the repudiating party has obtained by means of the contract. That this is the general rule is apparent from the following extracts from recent text writers:—

The general rule is that if an agreement is legally void and unenforceable by reason of some statutory or common-law prohibition, either party to the agreement who has received anything from the other party, and has failed to perform the agreement on his part, must account to the latter for what has been so received. Under these circumstances, the courts will grant relief irrespective of the invalid agreement, unless it involves some positive immorality, or there are other reasons of public policy why the courts should refuse to grant any relief in the case.

Morawetz on Private Corporations, section 721.

The same author adds in a footnote:—

It is sometimes said to be a maxim *in pari delicto melior est conditio possidentis*. The word *delicto* in this instance, however, means something more than mere illegality. It is difficult to define what constitutes such immorality as will cause the courts not only to declare a contract legally void, but to refuse all relief to the parties, irrespective of the contract. The decisions indicate that the matter rests largely in the discretion of the court in each particular case.

Persons who, at the expense of a corporation, have received benefit from an *ultra vires* transaction, even a transaction that is illegal as against public policy, may have to refund to the corporation to the extent of the benefit they have received.

Taylor on the Law of Private Corporations, section 314.

The general rule in regard to contracts which are not immoral, or where there are no other reasons of public policy why courts should refuse to grant relief, but are simply illegal and unenforceable on account of some statutory or common-law prohibition, is that either party to them who has received anything from the other party, and has failed to perform the agreement on his part, must account to the other for what has been so received. * * * These principles have been repeatedly applied in actions growing out of contracts entered into by corporations. Though illegal and unenforceable as contracts, recovery of the consideration has generally been allowed where higher public considerations than the immediate equities between the parties were not involved.

Spelling on Private Corporations, section 167.

Why should not a corporation be always liable to refund the money or property of a person which it has obtained improperly and without consideration, or, if unable to return it, to pay for the benefit obtained thereby? To say that a corporation cannot sue or be sued upon an *ultra vires* arrangement is one thing. To say that it may retain the proceeds thereof which have come into its possession, without making any compensation whatever to the person from whom it has obtained them, is something very different, and savors very much of an inducement to fraud. On the other hand, a person who has obtained corporate property or funds in an *ultra vires* transaction, has obtained what the parties dealing with him had no power, no authority to alienate. It belongs to the corporation, not to him. Therefore, as in every other case of a person obtaining, however *bona fide*, that which belongs to another, such person must make restoration, in specie or in value. It seems necessarily to follow that restoration must similarly be made when the alienation was *ultra vires*.

Waterman on Corporations, section 161, page 608.

Though a corporation cannot be sued, any more than any other citizen, directly upon a contract or analogous transaction which does not bind it, yet if it sets up this defense, it must restore to the other party what it has obtained from him. It may repudiate the transaction if it chooses, but if so, it must repudiate altogether; it cannot reprobate and approbate; it cannot keep what in another form it has rejected.

Green's Brice's Ultra Vires, 2nd American Edition, 721, cited in 1st Waterman on Corporations, section 161, page 608.

The general principles thus laid down by the text writers have been adopted almost, if not quite, uniformly by the United States Courts, and have become firmly fixed in the Federal jurisprudence, as will appear by a brief *r  sum  * of the cases in which the Federal courts have dealt with illegal contracts.

In the case of

Brooks vs. Martin, 2 Wall., 70, a partnership contract, confessedly against public policy, had been carried out, and the profits in the shape of money had passed into the hands of one partner. The courts sustained a bill by the other partner for a division of the proceeds. Mr. Justice Miller, delivering the opinion, said:—

Does it lie in the mouth of the partner, who has by fraudulent means obtained possession and control of all these funds, to refuse to do equity to his other partner because of the wrong originally done or intended to the soldier? It is difficult to perceive how the statute enacted for the benefit of the soldier is to be rendered any more effective by leaving all this in the hands of Brooks, instead of requiring him to execute justice as between himself and his partner; or what rule of public morals will be weakened by compelling him to do so.

In the case of

Marsh vs. Fulton County, 10 Wall., 676, a suit was brought by an innocent holder for value upon certain county bonds which were invalid and not authorized by statute. The court (Mr. Justice Field delivering the opinion), while holding that the bonds were invalid, and could not be made the foundation of an action, at the same time announced the following principle, to which it has since steadily adhered:—

We do not mean to intimate that liabilities may not be incurred by counties independent of the statute. Undoubtedly they may be. The obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or

compensation; but this is a very different thing from enforcing an obligation admitted to be created in one way when the statute declares that it shall only be created in another and different way.

In the case of

City of Louisiana vs. Wood, 102 U. S., 294, a municipal corporation issued bonds which were illegal. A purchaser of such bonds tendered them back to the city, and demanded the repayment of the money which the city had received, and subsequently brought an action. The court (Chief Justice Waite delivering the opinion) said:—

While, therefore, the bonds cannot be enforced because defectively executed, the money paid for them may be recovered back. As we took occasion to say in *Marsh vs. Fulton County*, 10 Wall., 676, the obligation to do justice rests upon all persons, natural or artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation.

In the case of

Congress, &c., Spring Co. vs. Knowlton, 103 U. S., 49,

the point involved in the present case was directly considered. In that case, in pursuance of an illegal scheme to increase the capital of a corporation and issue full-paid stock, in consideration of payments amounting to only eighty per cent. of its par, one Knowlton, a trustee and vice-president of the corporation, paid an installment of subscription to such stock. He failed to pay subsequent calls, and the company forfeited his stock. He then brought suit in the State of New York to recover back the installment paid. The Referee, to whom the case was referred, reported that he was entitled to recover, and judgment was entered upon the Referee's report. Upon an appeal to the Commission of Appeals of the State of New York, that judgment was reversed upon elaborate opinions by the commissioners. The commission based its opinion upon the fact that the scheme was illegal and contrary to public policy; that the contract had been partially executed by the payment of the first installment,

and that under these circumstances the court would not allow the plaintiff to recover back this first installment so paid as part of an illegal agreement. The suit was subsequently removed to the Circuit Court for the Northern District of New York, and upon the trial that court allowed the plaintiff to recover. A writ of error was taken to the Supreme Court of the United States, which sustained the judgment of the Circuit Court, saying:—

We think it clear that there was only a part performance of the illegal contract between the company and Knowlton in reference to the new stock for which Sheehan subscribed, and which he agreed to transfer to Knowlton. * * *

It is to be observed that the making of the illegal contract was *malum prohibitum* and not *malum in se*. There is no moral turpitude in such a contract, nor is it of itself fraudulent, however much it may afford facilities for fraud.

The question presented is, therefore, whether, conceding the contract to be illegal, money paid by one of the parties to it in part performance can be recovered back, the other party not having performed the contract, or any part of it, and both parties having abandoned the illegal agreement before it was consummated.

We think the authorities sustain the affirmative of this proposition. Their result is fairly stated in 2 Comyn on Contracts, 361, as follows: "Where money has been paid upon an illegal contract, it is a general rule that if the contract be executed and both parties are *in pari delicto*, neither of them can recover from the other the money so paid, "but if the contract continues executory and the party paying the "money be desirous of rescinding it, he may do so and recover back "by action of *indebitatus assumpsit* for money had and received. And "this distinction is taken in the books that where the action is in "affirmance of an illegal contract, the object of which is to enforce the "performance of an engagement prohibited by law, clearly such an "action can in no case be maintained, but where the action proceeds in "disaffirmance of such a contract, and, instead of endeavoring to en- "force it, presumes it to be void and seeks to prevent the defendant "from retaining the benefit which he derived from an unlawful act, "then it is consonant to the spirit and policy of the law that the plain- "tiff should recover."

Mr. Parsons, in his work on Contracts, vol. II., page 746, says: "All contracts which provide that anything shall be done which is dis- tinctly prohibited by law or morality or public policy are void, so he "who advances money in consideration of a promise or undertaking "to do such a thing may at any time before it is done rescind the "contract and prevent the thing from being done and recover back the money."

To the same effect see 2 Add. Cont., section 1412; Chit. Cont., 944; 2 Story Cont., section 617; 2 Greenl. Ev., section 111.

The views of the text writers are sustained by a vast array of authorities, both English and American.

A few will be cited. The case of *Taylor vs. Bowers*, L. R., 1 Q. B. D., 291, was an action to recover the value of property assigned for the purpose of defrauding creditors. A verdict was rendered for plaintiff with leave to move to enter a verdict for the defendant. A rule was obtained on the ground that the plaintiff could not, by the allegation of his own fraud, get back the goods from the defendant. The Queen's Bench sustained the verdict, the Chief Justice, Cockburn, delivering the opinion.

The defendant then appealed to the Court of Appeals, where the judgment was affirmed. Both courts agreed that an illegal contract partially performed might be repudiated and the money paid upon it recovered.

Lord Justice Mellish, in the Court of Appeals, said: "If the illegal transaction had been carried out, the plaintiff himself could not, in my judgment, have recovered the money. But the illegal transaction was not carried out; it came wholly to an end. To hold that the plaintiff is entitled to recover does not carry out the illegal transaction, but the effect is to put everybody in the same situation as they were before the illegal transaction was determined on and before the parties took any steps to carry it out. That, I apprehend, is the true distinction in point of law. If money is paid or goods delivered for an illegal purpose, the person who had so paid the money or delivered the goods may recover them back before the illegal purpose is carried out; but if he waits till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither can he maintain an action; the law will not allow that to be done."

The same rule substantially is laid down in the following English cases: *Lowry vs. Bourdieu*, 2 Doug., 468; *Tappenden vs. Randall*, 2 Bos. & P., 467; *Hastelow vs. Jackson*, 8 Barn & Co., 221; *Bone vs. Ekless*, 5 Hurls. & N., 925; *Lacaussade vs. White*, 7 T. R., 535; *Colton vs. Thurland*, 5 T. R., 405; *Smith vs. Bickmore*, 4 Taunt., 474; *Munt vs. Stokes*, 4 T. R., 561.

In *Morgan vs. Groff*, 4 Barb., 524, it was held that money paid on an illegal contract, which remains executory, can be recovered back in an action founded on a disaffirmance, and on the ground that it is void.

To the same effect are the following cases: *Ins. Co. vs. Kip*, 8 Cow., 20; *Merritt vs. Millard*, 4 Keyes, 208; *White vs. Bk.*, 22 Pick., 181; *Lowell vs. R. R. Co.*, 23 Pick., 24.

In *Thomas vs. Richmond*, 12 Wall., 349 (79 U. S., 453), this court cites with approval the note of Mr. Frere to the case of *Smith vs. Bromley*, 2 Doug., 666, to the effect that a recovery can be had as for money had and received, when the illegality consists in the contract itself, and that contract is not executed; in such case there is a *locus*

penitentia; the *delictum* is incomplete; the contract may be rescinded by either party.

The rule is applied in the great majority of the cases, even when the parties to the illegal contract are *in pari delicto*, the question, which of the two parties is the more blamable, being often difficult of solution and quite immaterial. We think, therefore, that the facts of this case present no obstacle to a recovery by Knowlton's administrators of the sum paid by him on the stock which had been subscribed for by Sheehan.

The law of New York does not, in express terms, forbid a corporation from issuing certificates for full-paid stock when the stock has not been fully paid. The illegality of such an issue is deduced from several sections of the law under which the Congress and Empire Spring Company was organized, namely, sections 38, 40, 41 and 49. We think it is fairly inferable from the record that the trustees of the company, one of whom was Knowlton, did not know that the plan adopted by them for the increase of the stock was illegal; and that when they discovered that it was forbidden by the law, and before any harm was done or could have been done, the scheme was abandoned. Under such circumstances, the rule which would prevent the recovery of the money paid to carry on the illegal plan would be a very harsh one, not founded on any law or public policy.

Mr. Justice Harlan dissented, but solely upon the ground that the question had already been decided by the Commission of Appeals of the State of New York, and that the judgment of that court was binding upon the parties. This case has additional weight from the fact that the Supreme Court of the United States, having before it the report of a Referee, two opinions and one dissenting opinion by the Commissioners of Appeals of New York, arrived at an opposite conclusion from that of the Commission of Appeals, and sustained to its fullest extent the principle for which the Central Transportation Company are contending in the present case, and the rule thus established has since been steadily adhered to.

In the case of

Parkersburg *vs.* Brown, 106 U. S., 487, illegal bonds were issued by a city and came into the hands of purchasers. Upon a bill in equity filed by those purchasers to recover property which had been conveyed to the city in consideration of the bonds, the court held that to the extent of the property received the city was

bound to make compensation. Mr. Justice Blatchford delivered the opinion, and said:—

But, notwithstanding the invalidity of the bonds and of the trust, the O'Briens had a right to reclaim the property and to call on the city to account for it. The enforcement of such right is not in affirmation of the illegal contract, but is in disaffirmance of it, and seeks to prevent the city from retaining the benefit which it has derived from the unlawful act. (2 Com. Cont., 109.) There was no illegality in the mere putting of the property by the O'Briens in the hands of the city. To deny a remedy to reclaim it is to give effect to the illegal contract. The illegality of that contract does not arise from any moral turpitude. The property was transferred under a contract which was merely *malum prohibitum*, and where the city was the principal offender. In such a case the party receiving may be made to refund to the person from whom it has received property for the unauthorized purpose, the value of that which it has actually received. *White vs. Franklin Bank*, 22 Pick. (Mass.), 181; *Morville vs. American Tract Society*, 123 Mass., 129; *Davis vs. Old Colony Railroad*, 131 *Id.*, 258, 275; and cases there cited. The O'Briens having indorsed and sold the bonds, the holders of the bonds succeeded to such right of the O'Briens, as an incident to the ownership of the bonds. The O'Briens suffered the city to take possession of and administer the property. They were made parties to this suit originally, and have made no defense to it. The right which the plaintiffs so have to call on the city to render an account of the property is one which can be properly adjudicated in this suit in equity.

In *Salt Lake City vs. Hollister*, 118 U. S., 256, the court, Mr. Justice Miller delivering the opinion, while deciding the case upon a ground not involved in the present case, said:—

It remains to be observed that the question of the liability of corporations on contracts which the law does not authorize them to make, and which are wholly beyond the scope of their powers, is governed by a different principle. Here the party dealing with the corporation is under no obligation to enter into the contract. No force or restraint or fraud is practiced on him. The powers of these corporations are matters of public law open to his examination, and he may and must judge for himself as to the power of the corporation to bind itself by the proposed agreement. It is to this class of cases that most of the authorities cited by appellants belong, cases where corporations have been sued on contracts which they have successfully resisted because they were *ultra vires*.

But, even in this class of cases, the courts have gone a long way to enable parties who had parted with property or money on the faith of

such contracts to obtain justice by recovery of the property or the money specifically, or as money had and received to plaintiff's use. *Thomas vs. Railroad Co.*, 101 U. S., 71; *Louisiana vs. Wood*, 102 U. S., 294; *Chapman vs. Douglass County*, 107 U. S., 348, 355.

In the case of

Penna. Railroad Co. vs. St. Louis, &c., R. R. Co.,
118 U. S., 290,

the court (Mr. Justice Miller delivering the opinion), in refusing to enforce specific performance of an illegal lease, drew a very clear distinction between cases for the enforcement of such contracts and cases for the adjustment of the equities between the parties by compelling compensation for the property after the lease had been avoided, as follows:—

It is argued, in support of the decree, that though the contract of lease may be void, so that no action could originally have been sustained upon it, there has been for ten years such performance of it in the use, possession and control of plaintiff's road and its franchises by the defendants that they cannot now be permitted to repudiate or abandon it; that it now presents one of a class of cases which hold that where a void contract has been so far executed that property has passed under it and rights have been acquired under it the courts will not disturb the possession of such property or compel restitution of money received under such a contract.

Undoubtedly there are such decisions of courts of high authority, and there is such a principle, very sound in its application to appropriate cases. But we understand the rule in such cases to stand upon the broad ground that the contract itself is void, and that neither what has been done under it nor the action of the court can infuse any vitality into it. Looking at the case as one where the parties have so far acted under such a contract that they cannot be restored to their original condition, the court inquires if relief can be given independently of the contract, or whether it will refuse to interfere as the matter stands.

The same distinction was again stated in the case of
Pittsburgh, &c., Bridge Co. vs. Keokuk, &c.,
Bridge Co., 131 U. S., 371,

in which the court (Mr. Justice Gray delivering the opinion) said:—

It is proper to add that our judgment does not rest in any degree upon the ground suggested in argument, that the bridge contract and

the lease having been executed, the Pittsburgh and Pennsylvania companies, having received the benefits of them, are estopped to deny their validity, because, according to many recent opinions of this court, a contract made by a corporation, which is unlawful and void because beyond the scope of its corporate powers, does not by being carried into execution become lawful and valid, but the proper remedy of the party aggrieved is by disaffirming the contract and suing to recover, as on a *quantum meruit*, the value of what the defendant has actually received the benefit of. *Louisiana vs. Wood*, 102 U. S., 294; *Parkersburg vs. Brown*, 106 U. S., 487, 503; *Chapman vs. Douglass County*, 107 U. S., 348, 360; *Salt Lake City vs. Hollister*, 118 U. S. 256, 263; *Pennsylvania Railroad vs. St. Louis, &c., Railroad*, 118 U. S., 290, 317, 318.

In the case of

Central Transportation Co. vs. Pullman's Palace Car Company, 139 U. S., 24,

being the case which gave rise to the present bill in equity, the court, Mr. Justice Gray delivering the opinion, is careful to make the same distinction, saying:—

A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it.

In such case, however, the action is not maintained upon the unlawful contract nor according to its terms, but on an implied contract of the defendant to return, or, failing to do that, to make compensation for property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract.

In the case of

Logan County Bank vs. Townsend, 139 U. S., 67, the plaintiff sold to a national bank, for sixty-eight cents on the dollar, \$12,800 of the bonds of a municipal corporation, under an agreement that the bank would, upon demand, replace them to him at the same or a less price. The court held that while the contract was one which the bank had no right to make, it was bound to refund the property or its value, saying (Mr. Justice Harlan delivering the opinion):—

If the bank's want of power under the statute to make such a contract of purchase may be pleaded in bar of all claims against it based upon the contract—and we are assuming for the purposes of this case that it may be—it is bound, upon demand, accompanied by a tender back of the price it paid, to surrender the bonds to its vendor. The bank, in this case, insisting that it obtained the bonds of the plaintiff in violation of the Act of Congress, is bound, upon being made whole, to return them to him. No exemption or immunity from this principle of right and duty is given by the National Banking Act. "The obligation to do justice," this court said in *Marsh vs. Fulton County*, 10 Wall., 676, 684, "rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independently of any statute, will compel restitution or compensation." "This," it was further said, "is a very different thing from enforcing an obligation attempted to be created in one way when the statute declares that it shall only be created in another and different way." Upon this obligation to do justice rests the decision in *Louisiana vs. Wood*, 102 U. S., 294, 298, 299, where this court held a municipal corporation liable to an action for money received on bonds issued by it, and which, being issued without authority of law, were invalid. The money it got was paid to it in the belief that the bonds were valid obligations of the corporation, and therefore was paid by mistake. After citing *Moses vs. Macferlan*, 2 Burrow, 1005, in which it was said that an action lies for money paid by mistake, or upon a consideration which happens to fail, or for money got through imposition, and also *Marsh vs. Fulton County*, the court, speaking by Chief Justice Waite, said that the law implied from what was done a contract "that the city would, on demand, return the money paid to it by mistake, and, as the money was got under a form of obligation which was apparently good, that interest should be paid at the legal rate from the time the obligation was denied."

So in *Parkersburg vs. Brown*, 106 U. S., 487, 503, involving the liability of a municipal corporation upon bonds issued in its name and secured by deed of trust given by the person to whom they were loaned, and which bonds were held to be void for want of authority to execute them, the court said:—

"But notwithstanding the invalidity of the bonds and of the trust, the O'Briens had a right to reclaim the property and to call on the city to account for it. The enforcement of such right is not in affirmation of the illegal contract, but is in disaffirmance of it, and seeks to prevent the city from retaining the benefit which it has derived from the unlawful act. (2 Com. Cont., 109.) There was no illegality in the mere putting of the property by the O'Briens in the hands of the city. To deny a remedy to reclaim it is to give effect to the illegal contract. The illegality of the contract does not arise from any moral turpitude. The property was transferred under a contract which was merely *malum prohibitum*, and where the city was the principal offender. In

"such a case the party receiving may be made to refund to the person from whom it has received the property for the unauthorized purpose, "the value of that which it has actually received," citing *White vs. Franklin Bank*, 22 Pick., 181; *Morville vs. American Tract Society*, 123 Mass., 129; and *Davis vs. Old Colony Railroad*, 131 Mass., 258, 275. See also *Hitchcock vs. Galveston*, 96 U. S., 341, 351; *Chapman vs. County of Douglass*, 107 U. S., 348, 356, 357; *Salt Lake City vs. Hollister*, 118 U. S., 256, 263; *Clark vs. Saline County*, 9 Nebraska, 516; *Pimental vs. San Francisco*, 21 California, 351, 362.

In the case of

Block vs. Darling, 140 U. S. Reports, 234, in an action for a deposit of money, the defense was that the money had been deposited in order to cheat and defraud the plaintiff's creditors. The court held that the plaintiff might recover, saying (Mr. Justice Harlan delivering the opinion):—

Nor did the court below err in excluding evidence offered by the defendants conducing to show that the money claimed by the plaintiff to have been deposited with them to be paid to him on his order was so deposited with the intent to cheat and defraud his creditors. The evidence, if admitted, would not have relieved the defendants from responsibility to account for it. The plaintiff's suit to compel the return of the money may be regarded as one in disaffirmance of the arrangement under which the defendants claimed to have received it; and, if successful, would tend to defeat the alleged purpose of defrauding his creditors by having it kept upon secret deposit with the defendants. It is not a suit to recover money received and paid out under an illegal or immoral contract which has been fully executed. The suit is necessarily a disavowal upon the part of the plaintiff of any purpose to hide this money from his creditors. To allow the defendants to retain it upon the ground that he had originally the purpose to conceal it from his creditors would be inconsistent with the spirit and policy of the law. *Spring Co. vs. Knowlton*, 103 U. S., 49, 58, and authorities there cited.

In the case of

St. Louis, &c., Railroad Co. vs. Terre Haute, &c., Railroad Co., 145 U. S., 393,*

* This case was relied upon by appellant's counsel, but they failed to notice or call to the attention of the court the distinction pointed out in the opinion between an action by one who sets up the illegality for the purpose of recovering property for which he has received or is receiving full compensation and an action by one who, having been refused compensation because of illegality, merely seeks to recover his property for which the contract compensation was refused.

the court, in refusing relief to plaintiff, who, being in receipt of the benefit of an illegal transaction, was seeking the aid of a court to set it aside as against the other party, who had never repudiated it, said:—

This case is not like those in which the defendant, having abandoned or refused to perform the unlawful contract, has been liable to the plaintiff as upon an implied contract for the value of what it had received from him, and had no right to retain. *Spring Co. vs. Knowlton*, 103 U. S., 49; *Logan County Bank vs. Townsend*, 139 U. S., 67, and cases there cited.

The cases in the lower Federal Courts are uniformly to the same effect.

In the case of

American Union Telegraph Co. vs. The Union Pacific Railway Co., 1 McCrary, 188, a corporation was enjoined against retaking property conveyed under an illegal contract without restoring the property which it had received. The court, McCrary, circuit judge, delivering the opinion, said:—

No case has been cited in argument, nor have I been able to find one, which holds that a court of equity, having jurisdiction of the parties to "and the subject matter of" an illegal contract, should require one of such parties to give up what he has received under it, without requiring the other to do the same. Many cases hold that a corporation which has made a contract *ultra vires*, which has not been fully performed, is not estopped from pleading its own want of power when sued upon such contract; but that doctrine does not apply to a case where a party comes into a court of equity, and, while retaining all that he has received upon such a contract, asks to be permitted to retake what he has parted with under it. I take it there is nothing in the law, as there is certainly nothing in the principles of equity, to estop the court from saying that the obligation to return the property transferred under these contracts is mutual, and shall not be enforced against one of the parties without being at the same time enforced against the other. As the parties and the subject matter are now before the court, it is the duty of the court, as far as possible, to place them in *statu quo*.

The injunction heretofore granted will be so far modified as to make it clear that the railroad company is at liberty to institute legal proceedings, either by cross bill in this case or otherwise, to cancel and

set aside the said contracts upon a return of the consideration, and to settle and adjust, upon principles of equity, the accounts between the parties.

In the subsequent case of

Farmers' Loan and Trust Co. vs. St. Joseph, &c., Railroad Co., 1 McCrary, 247,

in the same court, a railroad company was allowed to recover just compensation for the use of its property, leased under an invalid lease, the court saying:—

But inasmuch as the transaction is not tainted with any immorality, I hold that the petitioner is entitled to recover, without regard to the contract, a just compensation for the use of its road and property during the time in controversy.

In another case in the same court,

Western Union Telegraph Co. vs. Union Pacific Railway Company, 1 McCrary, 558,

which was an attempt by a company to recover possession of property conveyed under an illegal contract without a return of the consideration, the same judge said:—

There is another ground upon which I should feel constrained to hold that the plaintiff has, by the amended bill, shown an interest in the telegraph lines and property in controversy which a court of equity should protect. Even if we assume that the contract is void, the property accumulated or constructed under it must, as between the parties, be disposed of according to equity, and the court will not refuse to deal with that property on the ground that it was acquired under an illegal contract. Such is the doctrine established by the Supreme Court of the United States. The case of *Planters' Bank vs. Union Bank*, 16 Wall., 483, was a suit to recover money received for the sale of Confederate bonds. In the course of the opinion Mr. Justice Strong said: "It may be that no action would lie against a purchaser of the bonds, or against the defendants, on any engagement made by them to sell. Such a contract would have been illegal. But when the illegal transaction has been consummated, when no court has been called upon to give aid to it, when the proceeds of the sale have been actually received, and received in that which the law recognizes as having had value, and when they have been carried to the credit of the plaintiffs, the case is different. The court is there not asked to enforce an illegal contract. The plaintiffs do not require the aid of any illegal transaction to establish their case. It is enough that the

"defendants have in hand a thing of value that belongs to them. Some "of the authorities show that, though an illegal contract will not be "executed, yet, when it has been executed by the parties themselves, "and the illegal object of it has been accomplished, the money or thing "which was the price of it may be a legal consideration between the "parties for a promise, express or implied, and the court will not "unravel the transactions to discover its origin." *Id.*, 499, 500.

And see the following cases cited and approved by Justice Strong in his opinion: *Faikney vs. Reynolds*, 4 Burrows, 66 (2069); *Petrie vs. Hannay*, 3 Term, 418, 419; *Lestapies vs. Ingraham*, 5 Barr, 71; *Armstrong vs. Toler*, 11 Wheat., 258; *McBlair vs. Gibbes*, 17 How., 232, 236; *Brooks vs. Martin*, 2 Wall., 70.

In *Brooks vs. Martin* it was held, upon full consideration, that after a partnership transaction, confessedly in violation of an Act of Congress, has been carried out, a partner in whose hands the profits are cannot refuse to account for and divide them on the ground of the illegal character of the original contract. All of these cases admit the invalidity of a contract bottomed in immorality or in a violation of a statute, and they all agree that where a party comes into court and asks relief upon such a contract it must be denied. But they make a distinction between those cases in which a court is asked to enforce such a contract and those in which a court is asked to deal with property which has been acquired as the result of the execution thereof. Such property may constitute the subject matter of a suit at law or in equity, notwithstanding the invalidity of the contract under which it was acquired. Applying this doctrine to the case in hand, we find, according to the allegations of the amended bill, that besides the property acquired by plaintiff from the United States Telegraph Company (and which became and is a part of the line), the plaintiff has expended upon said line over \$100,000 in excess of the contributions made by the railway company under the contract.

The fact seems to be that by expenditures made by the plaintiff, and by contributions from the railway company, the line has been constructed, reconstructed and maintained. If the contract were set aside, it would, I think, leave the parties joint owners of the property, and a case for equity jurisdiction, in the adjustment and settlement of their respective interests, would be presented.

In the case of

Western Union Telegraph Co. vs. Burlington, &c., Railroad Co., 3 McCrary, 130,

which was the case of a bill and cross bill arising under a contract in restraint of trade, the same judge said:—

We think the contract is capable of being construed divisibly.

It is not, however, necessary to pass finally upon this question, for we are clearly of the opinion that, even assuming the invalidity of the

entire contract, the plaintiff is entitled to relief, unless deprived of its interest in the property by the foreclosure proceedings, of which we shall speak presently. If we leave out of view entirely any claim of right based upon the contract, we find the complainant in possession of a line of telegraph constructed jointly by it and the railway company, each party furnishing portions of the material and labor for its erection, repair and operation.

The railway company furnished the poles and all the labor, except a foreman, to construct the line; the telegraph company furnished a foreman to superintend the work, and also furnished the wire and insulators. This certainly constituted the two companies joint owners of the property. In this respect the case does not differ materially from several other telegraph cases which have recently been considered in this circuit. *Atlantic and Pacific Tel. Co. vs. U. P. Ry. Co.*, 1 McCrary, 541; *Western Union Tel. Co. vs. U. P. Ry. Co.*, 1 McCrary, 558; *Western Union Tel. Co. vs. St. Joseph, &c., R. Co.*, 1 McCrary, 565.

In each of these cases the contract, being substantially the same as the one now before us, was held invalid, but the right of the railroad company, in consequence of such invalidity, to take the whole telegraph property was emphatically denied.

In the case of

Newcastle Northern Railroad Co. vs. Simpson, 23
Federal Reporter, 214,
the court (Acheson, Cir. J., delivering the opinion) laid down the rule as follows:—

The established rule in equity is that a corporation is accountable for benefits which it has received under an *ultra vires* transaction. Green's Brice, Ultra Vires, 717. Hence in holding that the defendant's compensation for the materials furnished and work done by him should be measured by what it would have cost the plaintiff's company to employ a responsible contractor to provide the same materials and perform the same work, the Master, I think, adopted a just standard. While the defendant is not under any guise to receive damages for the loss of his bargain, yet he is not to be put off with a bare reimbursement of his actual outlay. He is entitled to be paid for what he has done fair rates, such as any other railroad contractor might have recovered therefor, in the absence of express agreement as to compensation. * * *

Finally, I am of opinion that the plaintiff company is justly chargeable with interest on the amount found to be due to the defendant when the work was stopped. Green's Brice, Ultra Vires, 728. No equitable reason appears for denying interest. It is not shown or pretended that the company ever made a tender of money to the defendant or set apart or kept on hand a fund to pay him.

The rule thus established by the Federal authorities is so clear that it is not thought necessary to discuss the various cases which have arisen in the State Courts. In one way or another, either by the application of the doctrine of estoppel or by the application of the principles above laid down by the Federal courts, the State courts have always prevented a party from setting up the illegality of a contract as an excuse for performance, and at the same time retaining the property which by reason of that contract he has obtained. There is, however, a very recent case in the Supreme Court of New Hampshire which is so close in its facts to the present case that it may not be out of place to cite it. It is the case of

Manchester, &c., R. R. Co. *vs.* Concord, &c., R. R. Co., 66 New Hamp., 100, 20 Atlantic Reporter, 383.

This was a bill in equity for an accounting and the return of certain rolling stock belonging to the plaintiff corporation which went into the possession of the defendant corporation, and which the latter retained. To the bill in equity the defendant filed three pleas. The first plea alleged that the contract between the parties under which it went into possession of the property was *ultra vires*, and hence the plaintiff could not recover. To this plea the court said:—

The first plea avers that the contracts between the parties under which the defendant went into and retained the possession and management of the plaintiff's road for more than thirty years were wholly beyond the corporate powers of either party to make or to ratify, and that therefore the defendant should be hence dismissed with its costs and charges. In other words, not denying that it has received the full benefit of the performance of the contract by the plaintiff, the defendant says that it should in equity be permitted to retain the benefit and property so acquired and be dismissed with costs, because it was not empowered by its charter to perform what it promised the plaintiff in return. The demurrer to this plea is sustained. The defense set up is so repugnant to the natural sense of justice, so contrary to good faith and fair dealing, and so opposed to the weight of modern authority, that it need only be said that, in equity at least, neither party to a transaction *ultra vires* simply will be heard to allege its invalidity while retaining its fruits. However the contractual power of the de-

fendant may be limited under its charter, there is no limitation of its power to make restitution to the other party whose money or property it has obtained through an unauthorized contract, nor as a corporation is it exempted from the common obligation to do justice which binds individuals, for this duty rests upon all persons alike, whether natural or artificial.

The third plea set up that the road had been operated in violation of an anti-monopoly statute, and that property acquired by virtue of such operation could not be recovered. As to this the court said:—

The contracts have been executed on the part of the plaintiff; they were not immoral; and they were illegal only so far as they were prohibited by statute. Taking this to be so, and regarding the parties as truly in *pari delicto*, the case still falls within the general rule, "that if "an agreement is legally void and unenforceable by reason of some "statutory or common-law prohibition, either party to the agreement "who has received anything from the other party, and has failed to "perform the agreement on his part, must account to the latter for "what has been so received. Under these circumstances the courts "will grant relief irrespective of the invalid agreement, unless it in- "volves some positive immorality, or there are other reasons of public "policy why the courts should refuse to grant relief in the case." Mor. Corp., section 721. He adds: "These doctrines have been applied "repeatedly in suits arising out of contracts entered into by corpo- "rations, although prohibited by statute or by the common law, and "although the contracts were held illegal and unenforceable in these "cases, a recovery was allowed to the extent of the consideration "received."

The court then, after citing the case of *Brooks vs. Martin*, 2d Wallace, 70, said:—

We are aware that the doctrine of this case has been criticised, and perhaps denied, by some of the State courts; but it was reaffirmed in *Planters' Bank vs. Union Bank*, *supra*, and it is not found to have been changed or modified in any subsequent decision. It requires no words to apply the doctrine of *Brooks vs. Martin* to the present case; it applies itself. Nor do we find that its application involves any immorality, or that it is forbidden by any other reasons of public policy. Doubtless a court of equity is not positively bound to interfere in cases of this description, and may exercise its discretion; but it is peculiarly the office of equity to do justice, and justice manifestly requires that the defendant should not keep any part of the plaintiff's equitable share of the property it obtained from operating the plaintiff's road,

whether legally or illegally. Whatever the legislature may have intended to accomplish by the anti-monopoly Act of 1867, there is no reason to suppose their intention was to reward the Concord Railroad for its violation. And, however it may once have been, it is certainly now difficult to see how public policy is subserved by allowing the addition of a private wrong to a public wrong, which necessarily results when, without any equivalent in return, one party to an executed illegal transaction excludes the other from participating in the proceeds; and we entirely fail to appreciate the morality which denies in such cases any rights to the party whose money or other property has been thus appropriated by his associate, contrary to express agreement and common honesty, and which in conscience the benefited party cannot retain. The demurrer to the third plea is also sustained.

We may say of these authorities, as was said of Brooks *vs.* Martin in the last opinion cited, that it requires no words to apply their doctrine to the present case; it applies itself. And they show that the contention of appellant's counsel, that their client may by setting up the illegality of the contract retain the Central Transportation Company's property without compensation, is as contrary to law as it is contrary to good morals.

UNDER ALL THE EVIDENCE THE MEASURE OF COMPENSATION FIXED BY THE DECREE OF THE COURT BELOW WAS A MINIMUM ONE, AND, TO QUOTE THE LANGUAGE OF THE CONCURRING OPINION OF JUDGE DALLAS, "QUITE AS FAVORABLE TO THE PULLMAN COMPANY AS UPON ANY POSSIBLE VIEW OF THE FACTS AND THE LAW COULD REASONABLY HAVE BEEN REACHED."

The claim of appellant's counsel that the mode of ascertaining the proper compensation finally adopted by the court was inconsistent with its original opinion, and was unfair to the Pullman Company, rests upon a superficial statement of the facts, and will upon a careful examination of the evidence, as it was produced in the various stages of the cause, prove to be without foundation. It must be remembered that the evidence showed that at the time of the lease, the Pullman Company and the Central Transportation Company were sleeping-car companies of about equal size, the one substantially controlling lines west of

Chicago, the other substantially controlling the lines afterwards incorporated into the great Pennsylvania system from St. Louis and Chicago to the Atlantic Coast. Each had its own contracts and its own cars, and each had practically a monopoly of its own territory. The lease was made in pursuance of a suggestion to consolidate the two companies, and was drawn by counsel as a practical method of effecting such consolidation. In point of fact, a practical consolidation was made. The lessor company renewed contracts in its own name, substituted its own cars, and after a year or two even ceased to keep a separate account of the lessee's property, so that during the running of the lease, the property of the Central Transportation Company had become so thoroughly absorbed into the consolidated plant, which was called by the name of the Pullman Company, that identification and separation became impossible. Even the cars which the Pullman Company in its bill alleged that it had tendered turned out to be Pullman cars arbitrarily assumed by the Pullman Company for the purposes of the bill to be substitutes for the original Central Transportation Company cars. Under these circumstances, as the property so changed its form that separate appraisal was impossible, there was no other way to ascertain the value than to ascertain what was the value at the date of the lease and whether the evidence showed that as part of the consolidated plant it had retained that value at and after the repudiation of the lease. There could be no other means of ascertaining the value, and on this point there is no inconsistency in the opinions of the court.

Another question which arose in the case was one of perhaps more difficulty, and that was whether the Pullman Company was to be considered as trustee during the lease down to the time of repudiation, liable to account for any excess of earnings over the rental paid, or to be allowed any deficiency below the rental paid. There were two views which might have been held with regard to this. First, that inasmuch as the lease was void from the beginning, the Pullman Company was to be considered as

a trustee of the property. Second, that so far as the transaction had been carried out by both parties, it was an executed transaction, as to which neither had a claim against the other, and that therefore no account of the earnings during the lease should be had. The court in its opinion adopted the former view, and directed a comparison of the earnings with the rental. Owing to the failure of the Pullman Company to produce the information necessary to make that comparison, it could not be made; but it did appear from the evidence that the earnings exceeded the rental. Under these circumstances, the Central Transportation Company, anxious to avoid further delay by a re-reference to the Master, waived its claim for any excess of earnings, and the court limited, therefore, the decree to the valuation of the property at the time the lease was made, with interest from the date of the re-pudiation of the lease. Even if the allegation of the Pullman Company had been true and there had been any change of view on the part of the court, it must be remembered that the court was not bound to put the parties to the very great hardship of the delay which would be occasioned by a re-reference to the Master. The evidence was all before the court. It was not bound to call in a Master at all. It could always examine the evidence for itself and make a proper decree. The evidence here showed that the property of the Central Transportation Company, while not retaining its form, had as an element in the consolidated property increased and not diminished in value; and that the earnings of that property, not only during the lease, but afterwards, were largely in excess of the rental. While the exact figures could not be ascertained without a long and tedious account, there was sufficient evidence to show the above facts. Under such circumstances, it would have been idle to prolong this litigation, which had already lasted for so many years, when the court had before it evidence from which it was possible to make an equitable decree.

The rights of the parties in this court do not depend, however, upon whether the court below was consistent

or inconsistent, but upon the question whether under all the evidence in the case the Central Transportation Company is entitled to receive as compensation at least the sum awarded by the court. Fifteen years have elapsed since the repudiation of the lease, and eleven since the filing of the present bill. All the evidence which either side can obtain is before the court. If that evidence shows that the property when it last had a separate existence was worth at least the value fixed by the court, that as an element of the consolidated plant it had not diminished, but increased, in value, and that its earnings during the time both parties had carried out the lease had been greater than the rental paid, then there was no error in the decree of which the Pullman Company could complain. It may be well, therefore, to call attention briefly to what the evidence does show on these points.

1. As to the character and value of the property at the time of lease.

The Central Transportation Company was a pioneer company in the sleeping-car business. Starting in 1862 with a capital of \$200,000, and with cars which bear the same relation to the present cars as the original locomotives bear to the modern ones, it had grown and prospered with the rapid development of the sleeping-car business until at the time of the lease its capital was \$2,200,000. It was the owner of one hundred and nineteen cars, with their equipment, and of sixteen contracts with different roads, covering five or six thousand miles, and so connected as to form a system from the Mississippi to the Atlantic Ocean. It had about the same capital, and in many respects more valuable lines than its younger and more vigorous Western rival, the Pullman Company, although the latter company had more modern cars. It had an earning power as a separate plant of eleven and a half per cent. upon its capital. Some of its contracts were to continue during its incorporation, some were limited to the expiration of the patents, and some were for a term:

of years, but the fact that they expired at different times rather added to their value, as no one road could afford to run its own sleeping cars or make a contract with a rival sleeping-car company if the connecting roads continued to use the Central Transportation Company's sleeping cars, the business of sleeping-car transportation being conducted over long lines often embracing several railroads, and the comfort of the passengers demanding continuous service. In fact, the existence of an established system of transportation secured by contracts with various connecting roads involved almost a certainty of the renewal of contracts. This is well exemplified by the testimony of Mr. Pullman himself (Record, page 203), to the effect that although at the expiration of the fifteen-year contract the Pennsylvania Railroad could have created a five per cent. car trust and built its own cars, it was willing, by reason of the advantages of the connection with other lines operated by the Pullman Company, to allow that company two per cent. more than the car trust interest.

The cars and contracts together formed a most valuable property, and this property could be sold and assigned by the Central Transportation Company. The latter company owned no railroad and had no right of eminent domain. It could assign or dispose of any of its property. It could not indeed deprive itself of the right to acquire other cars and contracts and agree to go out of business altogether, and it was because of covenants to this effect that the lease was held *ultra vires* and invalid. But that it could sell any or all of its cars and contracts just as a private individual could sell them cannot be disputed. In fact, many of the contracts had been originally made with private individuals and afterwards purchased by the company. The one hundred and nineteen cars and the existing contracts could therefore be sold separately or together, and that together they had a salable value was established by the evidence. The most important witness on this point was Adolphus Torrey. At the time of the lease he was assistant general superintendent of the Central Transportation Company, and after the lease he be-

came superintendent of the Central Division of the Pullman Company and retained that position until he left to become chief of the transportation bureau of the Centennial Exposition. At the time of the lease he made an inventory of the Central Transportation Company's cars and equipments for the Pullman Company, and for purposes of his own he made an estimate or appraisement of the whole property of the Central Transportation Company. He testified that the cars and contracts together were worth to any purchaser over \$3,000,000 at the time of the lease, and this testimony the Pullman Company has not even attempted to contradict. Not a single witness for the Pullman Company testified that the cars and contracts together did not have a salable value, or that such value was less than the figure fixed by Mr. Torrey. His appraisement was corroborated by the fact that the property then had an earning capacity of over eight per cent. on this valuation. The Central Transportation Company contended that as Mr. Torrey was a gentleman of experience and of large knowledge of this particular property, his appraisement ought to be accepted in view of the fact that no evidence had been offered to contradict it. The Master, however, cut down the valuation to \$2,552,000, the selling value of the stock. If there was error in this it was an error in favor of the Pullman Company, and the figure found by the Master is a minimum value.

The assertion of appellants that this value included the value of a franchise is entirely without foundation. It required no franchise to own and operate the cars and contracts. Any individual could do so, and they would be as valuable in the hands of an individual as in the hands of a corporation. In fact many of them had originally been owned by individuals or firms. After selling this property the Central Transportation Company could take the purchase money and establish a new plant in other territory by purchasing other cars and contracts. Such a transaction was no more illegal than the sale of the stock, goodwill and fixtures of a business by a proprietor who removes to another city and purchases another business.

What the Supreme Court held that the corporation could not do was to covenant that it would not engage in business and would keep its corporate existence only to receive the rents under a lease. The Master, however, in fixing a value has excluded any compensation for such a covenant, and both his figures and those of Mr. Torrey are based upon the selling value of the property alone.

2. This value was a permanent value, not destroyed by the use of the property.

The purchaser of the cars and contracts would not take a property which would as a business investment naturally disappear in a few years, and as to which, therefore, there would be a temporary income representing merely the return of the capital invested. Most of the contracts provided that the railroads should maintain the cars and renew worn-out parts, and in any event the equipment could readily be kept up out of the income; and with the prestige and the advantage of contracts with connecting roads there was a business certainty of renewal of the separate contracts from time to time as they expired, as well as the extension of the business by new contracts with other connecting roads as they were built. The business probability was not that the plant represented by the contracts and cars would diminish in value, but that both the salable value of the capital and the amount of income produced by it would steadily increase. Such had been the past history in the case of the Central Transportation Company. Such was the history thereafter of the consolidated plant resulting from the lease. That both parties considered this property as having a permanent value appears from the very terms of the lease. It was for ninety-nine years. It provided for renewal of cars and for the renewal of contracts and new contracts in the name of the Pullman Company but to the use of the Central Transportation Company, and provided that in case of termination of the lease these renewed or new contracts should be assigned to the Central Transportation Company.

3. This valuable and, in a business sense, permanent property, consisting of cars and contracts, was absorbed and merged with the similar property of the Pullman property, so that while its value remained its identity was destroyed.

On this point there is no conflict of testimony. The Pullman Company substituted from time to time its cars for the Central Transportation Company's cars. It sold or received compensation for Central Transportation cars and carried the funds into its treasury. It exchanged Central Transportation Company's contracts for new contracts in its own name. For two years it preserved the identity of the sleeping-car lines established by the old contracts by keeping them in a division called the Central Transportation Division, but after that time it established a new division, called the Central Division, containing most of the old lines, but containing also new lines which by the building of railroads and the extension of the business naturally appertained to that territory. From time to time also, with the growth of the business, existing lines were altered or extended, and when the lease was finally repudiated the identity of the plant leased had disappeared, not because it was destroyed or its value diminished, but because it had been merged and consolidated into one system, formed by the union of the two companies, a system which had thereby become more valuable and of a greater earning capacity than the two systems if owned and operated separately.

4. The evidence conclusively showed that while the property lost its identity, its value as an element of the united property largely increased between the date of the lease and the date of repudiation.

At the time of the lease the Central Transportation Company's property had an earning capacity of eleven and one-half per cent. per annum. The property of the Pullman Company had an earning capacity of about thirteen per cent. During the fifteen years of the lease the average net earnings of the united plants were over seven-

teen per cent. (see Pullman statement, Record, page 1112), showing that with the increased facilities given to the public the earnings of the united plants were greater than the aggregate of their separate earnings. And this state of things continued after 1885, as is shown by the last statement produced, viz., 1890 (Record, page 1123), in which the net earnings are seventeen per cent.

It was thus demonstrated that the union of the plants caused a large and permanent increase in the value of both. It might be said that this increase in value might have been all applicable to the western half or the original Pullman lines, but fortunately the evidence shows conclusively that of the two the Central Transportation plant was the most valuable element in the aggregation. It will be remembered that the Pullman lines were shut off from that extensive system of which the Pennsylvania Railroad and its affiliated lines, stretching from Chicago to the eastern seaports, formed the backbone, and which was covered by the Central Transportation Company's contracts. This system forms the bulk of what has always been called the Central Division of the united plant, and fortunately a record of the relative importance of this division has been preserved. On pages 884 to 894 of the Record will be found copies of the comparative statements kept on the Pullman books from 1875 to 1885, from which it will be seen that not only did the Central Division produce much the largest net revenue, but that it produced the largest net earning per car. It was thus demonstrated that not only was the Central Transportation Company's plant more valuable as an element of the united plant than it was as a separate plant, but that it remained during the lease the most valuable element in the combination.

There is another piece of evidence that throws some light upon the question of value. After the lease had been carried out by both parties for nearly fifteen years, the Pullman Company represented to the Central Transportation Company that there was about to take place a large diminution in profits, and that there ought, therefore, to be a diminution of rental. It was in consequence

of the negotiation which then ensued that the disagreement arose which resulted in the litigation. It was represented by the Pullman Company that from the Central Transportation Company's lines an income was being received by the Pullman Company of over \$600,000 per annum, but that of this sum something over \$400,000 per annum arose from the payment by the Pennsylvania Company of what was called mileage in lieu of the maintenance of the car bodies and trucks of the cars; that upon the renewal of the contract, the Pennsylvania Company would not pay this mileage, and that, as a consequence, the earnings from the Central Transportation Company's lines would fall to about \$155,000; that of this sum about \$89,000 would represent a fair payment to the Pullman Company for interest on increased capital, depreciation of cars, &c., leaving only \$66,000 with which to pay the rental to the Central Transportation Company. This statement appears in the Record, pages 222-228, in the testimony of Mr. Pullman, as follows:—

I stated these facts to this committee, and I explained to them at the same time that under the existing contract the railroad company was paying the Pullman Company about \$400,000 per annum mileage, or the amount it was assumed to cost to maintain the bodies and trucks of the cars, as the original contract made fifteen years ago provided that the railroad should do; that I was pretty well satisfied that Mr. Roberts would not make a new contract and pay any mileage, that therefore the net revenue resulting to the Pullman Company under any new contract that could be made probably would be decreased by at least that amount. * * *

Q. About the canceling the old \$264,000 and agreeing to take a fair share. Was it at that interview that that was done, or was it at other interviews?

A. The interviews subsequent to that were altogether upon what we could do—what the fair share of the revenue would be and what it would probably be, and to fix an amount, they insisting on getting as great an amount of the estimated amount as possible. * * *

Q. Was anything said about a percentage—what percentage of the future earning should be paid?

A. No; I think not. I said at the outset that I would be willing to pay all the net revenue—all that the books would show the net revenue would be over and above our usual charge of interest and depreciation.

Q. Then what you were telling them you were willing to do was to

allow the whole of the net revenue after deduction of, I hardly gather exactly what?

A. After deducting what we deduct in our business, the interest upon capital and the depreciation of the cars.

Q. You did not mean to charge them interest upon their own capital, of course?

A. Interest upon capital we had put in.

Q. Your additional capital?

A. Yes, sir.

Q. That is what you stated to them as your idea of a fair share of the rental?

A. I think I stated all the time I was willing to give them more than a fair share of the rental.

Q. Not after they agreed to take a fair share?

A. I was willing to put it at the maximum; I wanted to make the arrangement, and I was willing to make a very liberal arrangement with them; and the figures that they investigated thoroughly showed that I was correct in that, and that the amount of \$66,000, as I recollect it now, was a little more than \$1000 or \$2000, perhaps more, than the books showed the proper amount to be.

There was also produced a written memorandum, submitted by the Pullman Company to the Central Transportation Company, showing this alleged diminution of earnings. This memorandum is found on page 538 of the Record, and is as follows:—

**COMPARATIVE STATEMENT OF EARNINGS AND EXPENSES OF CARS IN
CENTRAL TRANSPORTATION COMPANY'S LINES ON BASIS OF AC-
COUNTS FOR YEAR 1884.**

Earnings of cars in Central Transportation lines during year:—

Sleeping cars	\$927,659 00
Parlor cars	187,608 00
	_____ \$1,115,267 00

Number of cars to operate lines, 192.

Average earning per car, \$5808.68.

Average cost of maintenance of car body and trucks as per clearing house figures..	\$2,421 00
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Average cost of maintenance of upholstery, bedding, and equipment and expenses for washing, conducting, operating supplies, &c.	2,579 00

Average expense yearly.....	\$5,000 00
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Total expenses, 192 cars.....	960,000 00

Net earnings, 192 cars.....	\$155,267 00
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Old Contract.

Maintenance of car body and trucks assumed by Pennsylvania Railroad Company, 192 cars at \$2421.....	<u>462,832 00</u>
Total earnings and maintenance.....	\$619,099 00
Per car, \$3224.40.	
Less rental to Central Transportation Company.....	264,000 00
Balance	\$355,099 00

New Contract.

Net earnings	\$155,267 00
Per car, \$802.43.	
Less rental to Central Transportation Company	66,000 00
Net income	89,267 00
Deficit as compared with old contract.....	\$265,832 00

It will be observed that this statement purports to be based upon an average earning per car of \$5808.68. When the renewal contracts with the Pennsylvania Railroad were produced, it was found that while it was true that the railroad company was relieved of the payment of mileage, that action was based upon the estimate that thereafter gross earnings per car of the Pullman Company would be \$7500. The first renewal contract (printed in the Record, page 40) provided:—

Third.—The railroad company, as proper compensation for the maintenance of the running gear and bodies of said cars, as provided in the preceding article, hereby agrees to pay to the Pullman Company monthly mileage at the rate of three cents per mile for each mile run by said cars under the terms of this contract over the railroads embraced in the first article hereof, unless such cars shall hereafter have an average gross earning of \$7500 or more per car per annum, in which event nothing shall be paid.

In the supplemental agreement (printed on page 52 of the Record) it was provided:—

AND WHEREAS, It is believed by the parties, and the same is so assumed without further accounting, that all of the cars to be so operated under said agreement except those on the lines hereinafter stated, will earn an average of \$7500 per car per annum;

AND WHEREAS, Certain other matters in connection with the subject of said agreement have agreed upon and are deemed proper to be evidenced by written agreement:

Now this Agreement Witnesseth, That the said parties hereto, in consideration of the premises and of the sum of one dollar by each to the other in hand paid, receipt whereof is hereby acknowledged, and their mutual covenants hereinafter set forth, do covenant and agree as follows:—

First.—That the third article of said agreement, hereinbefore recited, shall be held to be abrogated and of no effect as to all of the cars assigned or to be assigned, furnished or to be furnished, under the provisions of said agreement dated 26th of January, A. D. 1885, except only the cars upon the following sleeping-car lines, namely:—

1. The line between Philadelphia and Williamsport.
2. The line between Pittsburgh and Toledo.
3. The line between Pittsburgh and Indianapolis via Dayton.

That this expectation was substantially justified appears from the fact shown on pages 648 and 649 of the Record, that in the year ending July 31st, 1887, which was the first year after the renewal contract went into existence, the gross earnings per car in the Central Division, which was the division containing the Central Transportation Company's lines, was \$7072.03. It requires only a moment's calculation to show that the increase of the gross earnings from \$5808.68, the basis of the written statement, to \$7072.03, the amount actually made, would raise the net earnings estimated in said statement, namely, \$155,267, to \$397,830, and after deducting the \$89,267 allowed by the Pullman Company for interest on increased capital, depreciation, &c., would leave a sum of \$308,561, or \$44,561 in excess of the rental reserved to the Central Transportation Company by the lease.

The figures in the written statement submitted by the Pullman Company, already quoted, were incorrect, but they were incorrect in favor of the Pullman Company, and assuming them to be correct, which is the strongest position against the Central Transportation Company that can be taken, it would show that the only difference made by the renewal contract was that the Pullman Company, after being allowed everything it claimed for interest on increased capital, depreciation of cars, &c., was receiving

\$44,000 in excess of the rental instead of between two and three hundred thousand dollars in excess of the rental. No stronger evidence of the value of this property could be produced than to show that upon the basis of the figures prepared by the Pullman Company, figures which certainly did not err against it, the property conceded by the Pullman Company to be in its hands at the date of the repudiation of the lease, as the property of the Central Transportation Company, was producing an income of over \$300,000 after allowing for all interest on capital, depreciation, &c., claimed by the Pullman Company.

In connection with this statement made by the Pullman Company to the Central Transportation Company, it may be well to call attention also to the fact that at the time of making it, the Pullman Company offered to give to the Central Transportation Company not only \$66,000 per annum thereafter, but the option to exchange Central Transportation stock for Pullman stock on the basis of four shares of Central Transportation stock, par fifty dollars, for one share of Pullman stock, par \$100. This offer is found in the Record, page 154, and Mr. Pullman's account of it in the Record, page 227. The Pullman stock was then selling in the market from \$112 to \$114 (Record, page 228), and was really, as the annual statement on page 1113 of the Record shows, worth from \$140 to \$150, as the company had a surplus of \$7,533,711.92 on a capital of \$15,924,800 and was earning over sixteen per cent. per annum. Assuming it to be worth \$140, the Pullman Company was offering \$1,540,000 for the Central Transportation Company's plant, and that not because of the lease, since the Pullman Company then claimed the right to terminate the lease and the business had been long since absorbed and monopolized, but because of the intrinsic value of the Central Transportation Company's plant as an element of the Pullman system. The evidence showed that the revenues had not fallen, and that the plant was worth more than double the amount offered; but this offer is referred to as showing the absurdity of the position now taken by the Pullman Company, that in 1885, when it

made an offer equivalent to \$1,540,000, the only property belonging to the Central Transportation Company consisted of a few worthless cars.

Enough has been said to show that although the Central Transportation Company's property had been so absorbed and merged in the consolidated plant that in 1885, the date of the repudiation, it could not be separately appraised, yet that it retained its value as an element of the consolidated plant of which it formed a part and shared more than proportionately in the increase in value which was shown to have taken place in the consolidated plant. If to-day the Central Transportation Company was awarded its proportionate share of the Pullman property with its assets of over \$40,000,000 largely accumulated out of the earnings of the consolidated plant, its award would be many times the \$2,552,000, awarded by the Master, and yet this proportionate share is what the Pullman Company has realized because of the lease, and under any award which the court can make, that company will be a gainer by its act in repudiating the lease. Had the lease continued to be carried out, the Central Transportation Company during the years which have been spent in litigation would have received all of the principal and most of the interest awarded by the Master, and would still have a property producing \$264,000 per annum; and there is every reason to believe from the evidence, as to the character and earning capacity of the plant, that by prolonging the litigation for fifteen years the Pullman Company has made enough out of the earnings of the Central Transportation Company's lines above legal interest to enable it to pay the entire principal of the award. The hardship of the case to the Central Transportation Company is that although its plant, appraised by a competent expert, who is not contradicted by any witness called by the Pullman Company, at \$3,000,000, was retained by the Pullman Company and continues as an element of the consolidated plant to earn a very large per cent., yet the Central Transportation Company is compelled to litigate for fifteen years, receiv-

ing in the meanwhile no income whatever from its plant, and being paid at the end simply the original value, with six per cent. interest. It may be said that it became a partner with the Pullman Company in an enterprise beyond the powers of either company, but even with the payment of the decree made by the court below, it obtains as its share of the dissolution of the enterprise the minimum value of its property, while the Pullman Company keeps the property and all its gains. No candid mind, after reading the evidence, can escape the conclusion so concisely expressed by Judge Dallas in his concurring opinion, that the award was "quite as favorable to the Pullman Company as upon any possible view of the facts and "the law can reasonably have been reached."

5. Even if the court ought to reopen the executed part of the contract and take an account of rental and earnings, the evidence shows that the rental exceeded the earnings.

It is clear that according to the principles of law laid down in *St. Louis Bridge Co. vs. Terre Haute, &c., R. R.*, 145 U. S., 393, the Pullman Company was not entitled to be credited with any deficiency of earnings below rental. Assuming that the covenant of the Central Transportation Company not to engage in business was an invalid contract, yet the company had stayed out of business until the business had become so absorbed and monopolized that it could not be interfered with, and during the fifteen years of the lease the Pullman Company had received its consideration and paid its rent. It could not thereafter repudiate the contract and recover back the rental. It stood in a very different position from the other party, for it was the one who repudiated the lease. This distinction is clearly pointed out in *St. Louis, &c., R. R. Co. vs. Terre Haute, &c., R. R. Co.*, *supra*. Assuming, however, that it was entitled to a credit for any excess of rental, it had the burden of showing such excess. It may be conceded that owing to the destruction of the identity of the property by merger the exact earnings could not

be shown, but their approximate value could have been shown by showing the earnings during the lease of the lines included in Central Transportation Company's territory. This has never been done. Instead of that the Pullman Company produced the statement which is referred to in the Master's report (Record, page 1181), and which shows an estimate of the earnings of lines up to the expiration date of the original contracts owned by the Central Transportation Company. As the Master reports that this table presents a nearer approach to a solution of the question than any other table produced, and as much importance has been given to it in the argument of counsel for appellant, it is important to understand just what it is. It will be recollect that the original contracts belonging to the Central Transportation Company expired at different dates, and that the lease contained a provision for their renewal, if possible, in the name of the Pullman Company, but to the use of the Central Transportation Company. At the time of the lease, and as part of the arrangement between the companies under which the lease was executed, a number of these contracts covering the Pennsylvania Railroad system was exchanged for a new fifteen-year contract between the Pullman Company and the Pennsylvania Railroad Company. Contemporaneous with the expiration of this contract came the quarrel between the Pullman Company and the Central Transportation Company and the repudiation of the lease by the former. During the whole of the fifteen years, therefore, in which the Pullman Company was paying rental under the lease, it was receiving earnings under the fifteen-year contract with the Pennsylvania Railroad for the operation of lines originally belonging to the Central Transportation Company.

In order to ascertain whether there had been any deficiency of earnings below rental, it would be necessary to state the earnings under this contract and the contracts with other railroads for the fifteen years and compare them with the rental during the fifteen years. Instead of that, the Pullman Company states the earnings of the

Central Transportation lines, including those covered by the Pennsylvania Railroad fifteen-year contract, but only to the expiration dates respectively of the original contracts, and then compares this with the rental for the whole of fifteen years, thus, of course, showing a deficiency. The table is found on page 919 of the Record, and it will be seen that earnings are given for only from four to twelve years respectively on the various lines, while, as appears from the Master's statement on page 1181 of the Record, the rental is deducted to January 1st, 1885, the whole fifteen years.

This table is erroneous in many other respects. The Pullman Company is allowed six per cent. depreciation on capital yearly and six per cent. interest on the whole capital without deducting the yearly depreciation, and the amount charged for depreciation is very much greater than the evidence justifies. Sufficient, however, has been said to show that the table presented no just comparison of earnings and rental, and the Pullman Company, although requested, did not show or produce any table showing the earnings over the Central Transportation Company's lines for the whole fifteen years which could be compared with the rental paid during the similar period.

An effort has been made in appellant's brief to show that the Pullman Company did not know what they were required to show, but this contention hardly merits a serious reply. The rental was paid from 1870 to 1885, viz., fifteen years. In order to compare rentals with earnings it was necessary to state earnings from the Central Transportation lines for the same period, viz., the fifteen years from 1870 to 1885. There could not be any doubt as to this, but if there had been, the written request of the Master, made soon after his appointment, asked the Pullman Company to produce "a statement of the earnings "of the various lines included in the Pullman lease between "February 17th, 1870, and February 17th, 1885." There was no ambiguity about this request, and the statement thus asked for was the only one which would enable any comparison of rental and earnings to be made. This

statement the Pullman Company has never produced, and the Master was entirely justified in reporting that "the Pullman Company has failed, though requested by the Master, to furnish him with such information as would, "he believes, have enabled him to state an account."

The failure of the Pullman Company to produce any statement which would allow a comparison of earnings and rentals during the fifteen years becomes unimportant, however, in view of another fact, clearly and positively shown by the evidence of Pullman's own witnesses, to wit, that whatever was the exact amount of the earnings during the fifteen years, they were more than the rental.

Attention has already been called to the fact that contemporaneous with the lease, there was executed the fifteen-year contract with the Pennsylvania Railroad, and that it was not until the expiration of this contract that the Pullman Company claimed that the revenue had fallen below the rental so as to warrant a reduction under the lease. At that time the Pullman Company presented the written statement (already printed in full in this brief) in which it showed that at the close of the fifteen-year contract the net earnings to the Pullman Company was \$619,099, out of which it was paying the rental to the Central Transportation Company, \$264,000, and was keeping itself \$355,099. (Record, page 538.) This was at the end of the fifteen-year period during which the lease was carried out. We have an equally conclusive record as to the earnings at the beginning. For a period of two years the Pullman Company kept a separate record of the earnings of the Central Transportation Company's lines (printed on page 896 of the Record), and this shows net earnings largely in excess of the rentals. We thus have the earnings both at the beginning and at the end of the lease largely exceeding the rental. With regard to the intervening time we have—

First.—The seventeen-year statement of the Pullman Company, found at page 1112 of the Record, showing that while there was some variation in the profits of the consolidated plant, there was, on the whole, a steady increase

in the earnings and a gradual accumulation of surplus from \$120,667.13 in 1870 to \$7,533,711.92 in 1884.

Second.—The separate accounts from 1874 to 1885 of the Central Division, which included the old Central Transportation Company's lines. These reports are found on pages 884 to 894 of the Record, and contain not merely the aggregate earnings, but the net earnings per car. They show that the Central Division was both as to aggregate revenue and average earning per car the most profitable division of the consolidated plant, and that there could have been no fall of revenue of the Central Transportation lines below \$264,000. There are, it is true, two years between the time when separate accounts of the Central Transportation Company's lines were discontinued and the time when separate accounts of the Central Division were commenced, but these years, as is shown by the seventeen-year statement above referred to, were the most profitable years of the operation of the consolidated plant, yielding between twenty and thirty per cent. profit.

In addition to this testimony we have the testimony of Mr. Bird, one of the Pullman auditors (Record, page 872), as follows:—

Q. You, together with a force in your office, have been engaged for a number of months in examining the accounts of the operation by the Pullman Company of the lines originally belonging to the Central Transportation Company, have you not?

A. I have.

Q. You are therefore reasonably familiar with the results shown by those accounts?

A. I think so.

Q. It is true, is it not, that the operations of those lines in the year 1870, and subsequent years, as shown by these ledger accounts of the Central Transportation Company Division and the analytical statement books to which you have referred, show net results from the operations of those lines very largely in excess of the rental paid to the Central Transportation Company?

A. In excess, but not very largely. I should add that the analytical statement books to which you refer include very much other territory, so that whatever is shown by those analytical statement books would not refer wholly to the contracts in question.

That the earnings exceeded the rental during the fifteen years while both parties were executing the lease is thus shown—

1. By the fact that the Pullman Company never during that time asserted that the revenues had fallen or attempted to exercise the rights given by the lease in such case.
2. By the written statements of the Pullman Company purporting to show the exact earnings for the first two years and the last year of the period.
3. By the written statements of the Pullman Company showing the profits per car of the division containing the Central Transportation Company's lines, and that this division was the most profitable division of the consolidated plant.
4. By the written statement of the Pullman Company as to the aggregate earnings of the company.
5. By the testimony of the auditor of the Pullman Company.

In the light of this evidence it would seem impossible to doubt that the earnings exceeded the rental, and that no credit should be allowed on account of any deficiency.

In conclusion it may be well to briefly recapitulate the peculiar facts of this case—facts which the appellants in their argument persistently ignore—viz.:—

1. The Central Transportation Company was a large and prosperous company with a capital of \$2,000,000 and an earning capacity of eleven and one-half per cent.
2. It had contracts and cars the value of which, irrespective of any franchise and irrespective of any covenant in restraint of trade, was, as the Master has found, \$2,552,000, and as the evidence indicated, over \$3,000,000.
3. From the then business point of view, since confirmed by results, the plant had not only a large income-producing capacity, but the prospect of a permanent continuance and constant increase of the value of its capital.

4. In entire good faith and for the purpose of consolidating its business with a corporation of about equal size, it leased its property to the latter for ninety-nine years.
5. The united plant proved to be extremely profitable, and yielded, and has continued to yield, a profit of sixteen or seventeen per cent. Each portion of the united system contributed by the respective companies has grown and prospered.
6. Its property was so merged and absorbed with and into the property of the other company that while its value remained its identity was destroyed.
7. At the end of fifteen years the other company, notwithstanding the enormous success of the united plants, insisted that the share of the Central Transportation Company in the united plant was only earning about three per cent., and offered it the choice of that income or an exchange of stock, which would give it in value about \$1,500,000 for its property worth originally over \$3,000,000.
8. When that offer was rejected and suit brought under the lease, the other company set up that the lease was invalid, and that it was only bound to return the property or its value, and asked the court to ascertain that value.
9. When the Supreme Court had sustained the invalidity of the lease, but with a plain intimation that the property or its value must be returned, the Pullman Company declined to return the property or make compensation, and sought to withdraw its bill.
10. The identity of the property having been destroyed, the only way in which the court could fix the value was to ascertain what was the value at the date of the lease and whether the subsequent history of the united plant showed

that this value as an element of the value of the whole had not been diminished.

11. The evidence fully established both the original value at the date of the lease and the continuance and enormous increase of that value as part of the increasingly valuable and profitable united system.

12. The evidence also established that the rental paid by the Pullman Company during the executed portion of the term of the lease was less than its receipts from the property.

13. After ten years of wearisome and exhausting litigation the net result is that the Pullman Company remains the sole owner of the united plant with its increased value and great income-producing capacity, while the Central Transportation Company is awarded the minimum value of its plant with six per cent. interest from the date of repudiation. In other words, the Pullman Company is allowed to purchase as of 1885 at a reduced value, and to practically pay for it out of the difference between the six per cent. interest and the sixteen per cent. profits during the litigation.

It is submitted that no more meritorious case was ever submitted to a Chancellor. The Central Transportation Company is not seeking to set aside the decision of the Supreme Court; on the contrary, it acquiesced in it by filing its cross bill. All it asks is that the opinion of the Supreme Court shall be carried out, and that its declaration in that opinion, that

"the courts while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties so far as could be done consistently with adherence to law, by permitting property or money parted with on the faith of the unlawful contract 'to be recovered back or compensation to be made for it,'"

shall be given practical effect by a decree. This is the position of the Central Transportation Company. The

position of the Pullman Company is expressed in the paragraph with which it closes its brief, viz.:—

"But we insist that the cross defendant is not amenable to the demands of the cross bill. The contract of lease and the acts of the cross complainant create a situation in which, under their settled rules, the courts of the United States refuse to interfere, but leave parties where they have placed themselves. They decline to interfere for either party when contracts are void because of vicious or immoral covenants or considerations, and covenants are of that class which are void for restraint of trade or other flagrant violation of public policy."

There can be little doubt which proposition is in accordance with good morals or which most appeals to the enlightened conscience of a Chancellor. There can be as little doubt as to which is in accordance with "the obligation to do justice" which the Supreme Court, in the cases cited in the brief, has declared "rests upon all persons, natural and artificial." It is submitted upon the authorities cited that the legal decisions are in accordance with, not contrary to, the moral obligation, and that whatever gain the Pullman Company has made by setting up the illegality of its own contract, it is at least bound to restore the property of the Central Transportation Company or its fair value.

FRANK P. PRICHARD,
JOHN G. JOHNSON,
For Appellee.

Since the foregoing brief was prepared and printed, the appellant's brief has been received. A few comments upon that brief are therefore added.

Appellee agrees that aside from the questions of jurisdiction the principal question is the legal effect to be given to the judgment of this court as applied to the facts disclosed by the evidence. If this court has held, as appellant contends, that a party to a contract can set up its invalidity, not only as a defense to a suit on the contract itself, but as a justification for keeping without compensation all the property of the other party to the contract which has been delivered to it under the terms thereof, then the Central Transportation Company must suffer the confiscation of all its property, although it acted with honest intent and under the advice of eminent counsel. If, on the other hand, this court has held, as contended for by appellee, that although a party to a contract may set up its invalidity as a defense to any action upon it, he cannot, because of such invalidity and his repudiation of the contract, confiscate the property of the other party, and that the court will always do justice between the parties and compel return of, or compensation for, property received by the repudiating party, then the decree in this case was just and should be affirmed.

So much of appellant's brief as deals with this legal question and with other minor questions of law in the case has already been fully answered in the foregoing brief. Appellant's discussion of the facts, however, requires some notice.

There are two striking features of appellant's brief, viz.: There is no clear and concise statement of the facts upon which the questions of law arise and there is an attempt to overthrow the findings of the court below on questions of fact by violent invective against the judge who delivered the opinion. Throughout the whole brief there is a persistent attempt to represent the court below as endeav-

oring to "evade" or "disregard" the decision of this court as to the validity of the lease. This is the more extraordinary since the decision that the lease was invalid was a decision of the very judge who delivered the opinion in the present case, and it was this court's affirmation of his decision that he is now accused of "evading" or "disregarding." The absurdity of this is so apparent that further comment would seem to be unnecessary.

In reading the various statements in appellant's brief as to the evidence—statements often couched in vehement and extravagant language—it must always be remembered that where a party to a cause attacks a finding of fact or a report of evidence by a Master or a lower court, the burden is on him to clearly prove that the finding or report is not correct. Every presumption is in favor of the finding of the court.

It is impossible, without extending this brief to undue length, to point out all the inaccuracies as to evidence in appellant's paper book, but a few examples will suffice.

On page 75, in speaking of the Act of 1870, as to which, the Master (Record, page 1141) reported that it was drawn by counsel for the purpose of obtaining legislative authority for the lease, appellant says: "No evidence whatever 'shows that the statute was procured for the express purpose of granting such authority.'" The fact is that the uncontradicted testimony of appellant's own witness directly sustains the Master's finding.

Mr. W. J. Howard, formerly general solicitor of the Pennsylvania Railroad, a witness called by appellant, testified (Record, pages 724, 725):—

Q. Did you not, in order to enable Mr. Pullman to lease the Central Transportation Company's cars and contracts, draft a special Act of Assembly authorizing the Central Transportation Company to do that?

A. I did.

Q. And that is the Act of 1869, is it not?

A. I presume that is the date; 1870 the Act is.

Q. But that is the Act, is it not?

A. I think it is.

Q. Was not the object of that Act to enable the Central Transportation Company to turn over its cars and contracts, in order that the Pullman Company might be enabled to make contracts with the Pennsylvania Railroad?

A. It was.

Q. That was your purpose in drafting it? I will repeat my former question: Was not the object of that Act to enable the Central Transportation Company to turn over its cars and contracts, in order that the Pullman Company might be enabled to make contracts with the Pennsylvania Railroad?

A. The purpose of it was just as is specified in the Act itself. My recollection is that the charter of the company had but a short time to run. I think twenty years was the limit originally; I think it extended that. There was no authority for the leasing of their property—leasing, hiring or transferring; and this was drawn for the purpose of enabling them to extend their charter and hire and lease their property.

Q. And then, having drafted and having that Act passed, you then drew a contract between the Central Transportation Company and the Pullman Company?

A. The Act is dated February 9th, 1870, and the lease is dated the 17th of February, 1870.

Q. You drew that lease in conjunction with Pullman's counsel, did you not?

A. Yes, I did; the Act I notice—the question is decided in the preamble of the lease.

It is boldly alleged on page 88 of appellant's brief that the alleged substantial and permanent character of the Central Transportation Company's plant was fictitious, and that there was in fact "no such plant and no such "value." When it is remembered that this is spoken of a company which was at that time the equal of the Pullman Company, with larger capital, with equal earnings, with poorer cars, but with richer and more profitable territory, the recklessness of such a statement is remarkable, and when this statement is compared with the careful report of the Master (Record, page 1133) setting forth in detail the character and value of the plant, it will be at once seen how absolutely at variance with the evidence the statement is.

One of the most important and remarkable inaccuracies of appellant's brief is in the statement often repeated that the Pullman Company answered every call of the Master, and that the court below on the argument of the exceptions to the Master's report shifted its ground, and without any evidence arbitrarily assumed that the earnings were equal to the rental, and thus decided a material point adversely to the Pullman Company, without any evidence and without the opportunity to produce proof. Nothing could be further from the real facts. The original opinion of the court required a comparison of the earnings and rental during the fifteen years in which rent was paid under the lease. The Master accordingly called for a statement of the earnings during those fifteen years. There could be no possible mistake as to this call. It was obvious that as the one factor, namely, fifteen years' rental, was known, it was necessary to have the other factor, namely, fifteen years' earnings. This statement the Pullman Company never produced. It obtained weeks of delay before the Master to prepare statements which, when produced, were always for periods less than the fifteen years, so that no accurate comparison could be made. At the time of the lease various contracts covering the Pennsylvania system, in the name of the Central Transportation Company, were exchanged for a fifteen year contract in the name of the Pullman Company. The earnings under this contract would have been for the same time as the rental, and could have been compared with the latter, but instead of giving a statement of these earnings under this contract for the fifteen years, the Pullman Company made up hypothetical statements of what would have been the earnings under the various old contracts expiring at different periods within the fifteen years. The result of comparing fifteen years' rental with much less than fifteen years' earnings was always to bring the Central Transportation Company in debt, and this is the way in which the statement alluded to by the Master on page 1181 of the Record is made up. The Record will be searched in vain for any statement produced by

the Pullman Company showing the earnings during the fifteen years in which the rentals were paid. When, therefore, the case came before the court upon the report of the Master, there was no statement of fifteen years' earnings which could be compared with the statement of fifteen years' rentals. There was, however, abundance of evidence that the earnings of the Central Transportation lines during the fifteen years exceeded the rentals. This evidence has been already pointed out on pages 89-91 of this brief. The court did not arbitrarily assume that the earnings equalled the rental, but found this fact from evidence, and as the Central Transportation Company did not ask for a decree for the excess of earnings, a reference back to the Master was unnecessary.

The truth is that there is no real conflict of evidence or any substantial dispute as to the facts. The Central Transportation Company possessed a plant worth at least the value reported by the Master. It consolidated with the Pullman Company by means of a lease. The two plants were so thoroughly consolidated that identification became impossible, but the evidence fully established that as an element of the consolidation, the plant of the Central Transportation Company increased rather than diminished in value, and continues to be the most profitable portion of the consolidated plant. While the lease was executed by both parties, the receipts exceeded what was paid to the Central Transportation Company. What other relief can be given except to give the original value, leaving to the Pullman Company all the plant with its magnificent earning power and its ever-increasing business? The appellant calls this "unmitigated pillage." To the able judge who delivered the concurring opinion in the court below, it seemed but scant justice, and this, it is submitted, is the impression which would be left on the mind of any dispassionate reader of the evidence.

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